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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1945

No. 21

THOMAS MARTINO, PETITIONER,

vs.

MICHIGAN WINDOW CLEANING COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR CERTIORARI FILED JANUARY 17, 1945.

CERTIORARI GRANTED JUNE 18, 1945.

SUPREME COURT OF THE UNITED STATES

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[fol. 1]

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

Civil Action No. 3449

THOMAS MARTINO, Plaintiff,

v.

MICHIGAN WINDOW CLEANING COMPANY, a Michigan corporation, Defendant

AMENDED COMPLAINT—Filed September 24, 1942

I

The plaintiff brings this action for himself and for all other persons similarly situated for the purpose of enjoining the defendant from violating the provisions of Sec. 15(1) (a), 15(a) (2) and 15(a) (3) of the Fair Labor Standards Act of 1938, Act of June 25, 1938, c. 676, 52 Stat. 1060, U. S. C. Title 29, Sec. 20 et seq., hereinafter call The Act, by virtue of Sec. 16(b) and Sec. 17 of the Act and for damages, liquidated damages, attorney fees, and costs.

II

Jurisdiction of this action is conferred upon the Court by Sections 16(b) and 17 of The Act.

III

The defendant is, and at all times herein mentioned was, a corporation organized under and by virtue of the laws of the State of Michigan, having its office and principal place of business at 629 W. Larned Street, in the city of Detroit, Wayne County, Michigan, engaged in the business of wash-
[fol. 2] ing windows, painting, and similar maintenance work on buildings in which interstate commerce is carried on and conducted.

IV

The defendant has at all times herein mentioned employed upwards of twenty (20) men. The plaintiff and all other persons similarly situated were employed by the

defendant in occupations necessary to the production of goods in interstate commerce that he and the other employes, as aforesaid, washed windows on buildings in which the tenants and or occupants were engaged in producing goods for interstate commerce.

V

The plaintiff appears herein for himself, as a former employe of the defendant, and also in a representative capacity for all other persons similarly situated, as authorized by Sec. 16(b) of the Act and as further authorized by Rule No. 23 of the Rules of Civil Procedure. Plaintiff especially appears herein for the following other persons in addition to himself: Albert Schrott, Waldo L. Dowell, John Hodas, H. O. Peters, Louis Vamous, John Pfeiffer, Ted Normile, Frank Ellin, Loren Hayes, Kenneth Theisen, Arthur Haussmann, Bill Milligan, Charles Liges, Spencer Bing, O. Lyons, R. Wallen, Clair Otterson, Anthony Sacco, Christopher Sanders, E. Sanders, George Soller, Wayne McLaughlin, Homer Wallen.

VI

Subsequent to October 24, 1939, the defendant required the plaintiff and other employes similarly situated to work in excess of forty-two (42) hours per week, and subsequent to October 24, 1940 the defendant required the plaintiff and other employes similarly situated to work in excess of forty (40) hours per week, and at no time did the defendant pay the plaintiff and other employes similarly situated time and a half for such work, save only for work in excess of forty-four (44) hours per week, contrary to the Act, and to the [fol. 3] great harm and injury of the plaintiff and all other employes similarly situated.

VII

The full particulars as to hours, dates, rates, etc., are not at the command of the plaintiff, but are within the control of the defendant, and when the defendant has satisfactorily complied with the requirements of the interrogatories hereto annexed, the plaintiff will ask leave of the Court to file an Amended Complaint outlining in greater particularity the claims of the plaintiff and other employes.

VIII

The defendant corporation has sought by various means to bring influence to bear on its employes not to institute this suit, and that such pressure amounts to coercion and intimidation, and the employes have good reason to fear that they will suffer discrimination at the hands of the employer as a result of their action in participating in this suit; and that such coercive measures will continue unless the employer is enjoined therefrom by the injunction of this Honorable Court.

IX

The plaintiff, in his own behalf, and in behalf of other employes similarly situated, therefore prays:

A. That the defendant may be enjoined from failing to pay time and a half for all work performed in interstate commerce in excess of forty hours per week; and that such injunctive relief may be both temporary, pending the trial of this cause, and thereafter permanent.

B. That the defendant may be enjoined from intimidating, threatening, or otherwise coercing the various employes by reason of their participation in this action.

C. That judgment may be entered in favor of the plaintiff and other employes so situated for the amount of unpaid wages for overtime, according to the Act, together with a like sum as liquidated damages, together with rea- [fol. 4] sonable costs and attorneys fees. Wherefor the plaintiff will ever pray, etc.

X

Interrogatories

1. Give the hourly wage rates of such employes, past and present, as set forth in Interrogatory 1, showing increases or decreases in such rates, as the cases may be. Answer:

2. Give the various and several jobs on which each employe worked subsequent to October 24, 1939, to the present date. Give the name of the establishment where work was

performed, and the nature of the work engaged in by such establishment. Answer:

3. Give the hours of labor performed by each such employe, by the day, from October 24, 1939, to the present date. Answer:

4. Give the work week under which the defendant corporation operates. Answer:

(Signed) Thomas Martino.

In United States District Court

Answer to Amended Complaint and Defenses of Defendant—Filed September 29, 1942

Now comes the Michigan Window Cleaning Company, a Michigan Corporation, defendant herein, answering the Amended Complaint of the plaintiff, and says:

I

Answering paragraph I, this defendant denies on information and belief that the plaintiff has any authority to bring the action for any person other than himself, and [fol. 5] denies that there is any occasion for any relief under the statutes relied upon by the plaintiff; defendant states the truth to be that the statutes in question have no bearing upon the business of the defendant, and are not applicable.

II

Defendant denies that the Court has jurisdiction in said cause, because plaintiff has no cause of action against this defendant by reason of the matters set forth in this answer and defenses filed herewith.

III

Defendant admits allegations in the third paragraph, except that portion which seeks to imply that the defendant is engaged in interstate commerce by reason of the work done by the defendant, which is hereby denied, and in support of its denial, defendant will show that if is not engaged in interstate commerce within the meaning of the Act.

IV

Defendant denies the allegations contained in the fourth paragraph.

V

Defendant, on information and belief, denies the allegations contained in said fifth paragraph.

VI

Defendant denies the allegations therein contained, and further states that the provisions of the Act relied upon by plaintiff have no relation to the situation of the defendant and its employees.

VII

Answering paragraph VII, this defendant denies the allegations therein contained, and in support of its denial will show that the plaintiff has full knowledge of all the hours he worked for the defendant, or should have such [fol. 6] knowledge without access to any records of the defendant. And this defendant denies that the so-called interrogatories have any place in said complaint or are a proper part thereof; that the insertion of the so-called interrogatories as a part of said complaint is not in compliance with the Rules of Civil Procedure for the District Courts of the United States, and the defendant demands that said interrogatories be stricken.

VIII

Defendant denies the allegations of paragraph VIII, and states the same to be without foundation in favor or truth, and says that said allegations are made for the purpose of attempting to artificially create an issue which does not exist; that plaintiff is not a proper person to seek redress under the section of the statute relied upon; that said plaintiff is not an employee of said defendant, and was not discharged by the defendant; that the statutes relied upon have no relation to the business of the defendant.

First Defense

The so-called interrogatories contained in said complaint are not properly a part of the pleading, and are not in compliance with Rule 33 of the Rules of Civil Procedure

for the District Courts of the United States, and defendant prays that said interrogatories be stricken from the complaint.

Second Defense

1. The business of the defendant does not come within the meaning of the Fair Labor Standards Act of 1938, being an Act passed by the Congress of the United States.

2. The defendant is not engaged in interstate commerce within the meaning of the Act, and its employees are not engaged in any of the operations defined in said Act.

Third Defense

That defendant is informed and believes it to be true, that plaintiff does not represent any employees of the de- [fol. 7] fendant, but has brought said action in an attempt to induce employees of defendant to join with him; that as a former employee of defendant, said plaintiff is not entitled to any injunctive relief and is not authorized to seek such relief on behalf of any of defendant's employees.

Fourth Defense

1. That it is necessary for a proper determination of the issues raised that the Detroit Window Cleaners' Union Local 139, B. S. E. L. U. be made a party defendant in said cause.

2. That said plaintiff is a business agent for said Union, and is an agent thereof.

3. That said Union is a voluntary association, composed of members engaged in the work of window cleaning and kindred occupation.

4. That said Union has for a number of years represented its members in negotiations with the defendant and other window cleaning companies, and as a result of such negotiations has executed contracts with the defendant and other employers.

5. That successive contracts have been executed between the Union and this defendant over a period of years, the last one having been signed on or about July 16, 1941, copy of which is in the possession of said Union and the plaintiff, to which reference is prayed as if particularly herein set forth and made a part hereof.

6. That said contract provides among other things that all employees "shall be employed through the office of the Union," and defendant is required to hire the employees sent by the Union; that the Union engages in fact in the capacity of an employment agency for its members; that the defendant may not hire any other than persons but "journeymen Window Cleaners, members of this (Union) organization."

7. That the plaintiff, the Union, and Union members know, knew, or should have known the provisions of the [fol. 8] contracts executed between the Union and the defendant and voluntarily submitted themselves for work thereunder; that neither the plaintiff, Union, nor the defendant at any time considered or believed that the Fair Labor Standards Act of 1938 had any bearing upon the work or type of work performed by the defendant or the business engaged in by it, and all the parties proceeded upon the understanding that the provisions of said Act did not apply.

8. That the present suit of the plaintiff may be an attempt on the part of the Union to circumvent the agreement entered into with the defendant, and it is absolutely essential that said Union be made a party defendant in order to permit the defendant to properly present its defenses and meet the issues involved in said suit.

9. That the action of the plaintiff and the Union amounts to a conspiracy to extort money from the defendant, contrary to the law; that if it should be determined that the provisions of the Fair Labor Standards Act do apply to the defendant, then said Union is a necessary party defendant by reason of its participation and action in executing the contract between it and the defendant, and should be held equally liable for any damages assessed.

10. That the contract between the Union and defendant is not an individual contract of labor with employees, but is an "Agreement between the Detroit Window Cleaners' Union, Local No. 139 B. S. E. L. U., affiliated with A.F.L. and the Individual Employers of Detroit and Michigan;" that the contract does not establish minimum hours which must be complied with, but does seek to establish maximum hours of work for each day and week, and overtime pay in excess thereof; that such work is voluntary on the part of each member; that employees may work less hours than the maximum.

Fifth Defense

That it would be inequitable and scandalous to permit the Union to penalize the defendant for having acted in [fol. 9] good faith with the Union in the execution of the contract herein referred to.

Sixth Defense

That either the Union entered into the agreement with the defendant in fairness, with the mutual understanding that the defendant was engaged in intrastate commerce and that the Fair Labor Standards Act of 1938 did not apply to the work of the defendant, or the Union entered into such agreement with the concealed intent and purpose of victimizing the defendant through a deliberate act on the part of the Union in executing said agreement, and then later proceed in the manner described in the complaint filed herein.

Seventh Defense

None of the employees of the defendant has made any demand upon the defendant at any time for any payment under said Act.

Eighth Defense

That the Union is a necessary party defendant because it was instrumental in negotiating said contract on behalf of its members; and if the provisions of said contract for hours and wages are found to be contrary to the provisions of the Act, and the Act found to be applicable to the defendant, then said Union is equally responsible with the defendant in the execution of said contract, and should be found equally liable for any damages.

Wherefore defendant demands:

(1) That the Court order the Detroit Window Cleaners' Union Local No. 139, B. S. E. L. U. to be made a party defendant to respond to the complaint and to this answer and defenses.

(2) That the Court discharge the defendant from all liability in the premises.

[fol. 10] (3) That the Court find that the provisions of the Fair Labor Standards Act of 1938 does not apply to the defendant.

(4) That if the Court should find that the provisions of said Act do apply, then damages to be assessed against the Union.

(5) That the Court award to the defendant its costs and attorneys' fees.

Michigan Window Cleaning Company, by J. Bomze, Defendant; Leo A. Mandell, Attorney for Defendant; Davidow & Davidow, Attorneys of Counsel for Defendant, by Larry S. Davidow.

In United States District Court

Stipulation of Facts and Stipulation of Issues of Facts—Filed November 23, 1942

The following constitutes a joint statement, made by the parties to this cause through their respective counsels, of the admitted facts and of issues of fact. The inclusion of any stipulated fact or issue of fact does not constitute an acknowledgment of relevancy or materiality of such fact or issue.

1. Stipulation of Facts

A. That the parties plaintiff were employed by the defendant in excess of the normal work week prescribed by the Act but were not paid time and a half for hours between 41 and 44, inclusive.

B. That the parties plaintiff were employed as window washers and cleaners by defendant corporation, and were [fol. 11] assigned by the defendant to the cleaning of windows on various buildings whose occupants were under contract with the defendant corporation for the performance of such window washing.

C. That among such occupants were companies definitely engaged in the production of goods in interstate commerce, such as various units of the General Motors Corporation.

D. That during an undetermined number of weeks the various parties plaintiff were employed in such occupations on such buildings in which such goods were produced in interstate commerce.

E. The union, acting for and on behalf of the plaintiffs, made an agreement with the defendant and renewed it for a number of years preceding and including 1939, up to and including the time of commencement of this suit.

F. The payment of compensation by defendant to its employees, including the plaintiffs in this suit, was in accordance with the agreement between the plaintiff and the union on one hand, and the defendant on the other.

G. The plaintiffs are members of Local Union 139, Detroit Window Cleaners' Union and were such members for a number of years previous to 1939 and up to and including the date hereof.

H. The agreement referred to and those agreements that preceded it, were freely, voluntarily and in good faith entered into between the union acting on behalf of its members and authorized so to do, and the defendant employer.

I. All the agreements executed between the union on behalf of its members and the defendant from the time their relations first began were fully observed by the defendant.

J. The agreement between the parties in existence at the time suit was started, and its predecessors, provided for a closed shop.

[fol. 12] K. Attached is a true copy of the agreement in existence at the time suit was started. The agreements previously in existence were substantially in the same form as the one attached hereto.

2. Issues of Fact

A. The precise number of work weeks in which the parties plaintiff were partially or wholly engaged in such occupations necessary to the production of goods in interstate commerce.

B. A breakdown thereof by employe, work week, and number of hours per work week per employe.

C. That Local 139 Detroit Window Cleaners' Union is a bona fide labor union within the meaning of the Act and that it properly, lawfully and completely represented its members, including the plaintiffs, in the negotiations that were carried on from time to time with the defendant and

which negotiations resulted in the various agreements that were originally made and subsequently renewed from year to year up to and including the time of institution of this suit.

D. The Local Union acting for and on behalf of the plaintiffs and its other members, had the use and benefit of the services of a competent lawyer, particularly skilled in the knowledge of the law affecting labor unions during all the negotiations over the period referred to in the previous statements of fact.

E. The plaintiffs knowingly, willingly and deliberately accepted the terms and conditions of the various agreements from time to time renewed and particularly from or after the passage of the so-called Wage-Hours Act up to the time the present suit was instituted.

F. The attempt to enforce the provisions of the Wage-Hours Act in the relations between the plaintiffs and the union on one hand, and the defendant on the other, would in effect be a violation and repudiation of the wages feature [fol. 13] of the agreement and its predecessors heretofore entered into between the parties concerned.

G. The union and its members agreed with defendant and other window cleaning companies that the work done by the employers was not embraced within the terms, "interstate commerce."

H. The renewal of the agreements following the passage of the Wage-Hours Act was based upon mutual agreement that the Wage-Hours Act did not apply to the employers, such as the defendant in this case.

I. No suggestion of violation of the Wage-Hours Act on the part of defendant or other employers claimed by plaintiffs until after the decision by the United States Supreme Court involving the New York-Loft case.

J. Until the present suit was instituted, plaintiffs and the union on one hand, and defendant and the other employers on the other, both acted upon the opinion and assumption that the Wage-Hours Act did not apply to the nature of the work done by the defendant and other employers.

K. The operation of washing or cleaning windows is not a necessary operation on buildings having anything to do

with the production activities carried on within those buildings; the washing of windows in no way contributes to or affect production activities that may be carried on in the buildings.

L. The defendant purchases all of its supplies in the City of Detroit and performs all of its operations within the State of Michigan and it does not cater to, service or supply the needs of anyone outside of the State of Michigan.

Léon A. Cousens, Attorney for Plaintiff; Davidow & Davidow, by Larry S. Davidow, of Counsel for Defendant.

Dated at Detroit, Michigan, November 23, 1942.

[fol. 14] IN UNITED STATES DISTRICT COURT

MOTION FOR SUMMARY JUDGMENT—Filed November 23, 1942

Now comes the above named plaintiff, for himself and for other persons similarly situated, by his attorney, Leon A. Cousens, and respectfully moves this Honorable Court that summary judgment be entered against the said defendant on the pleadings, and in support whereof the plaintiff says:

1. It is admitted by the pleadings that the plaintiff and other employes worked in excess of the hours prescribed by the Fair Labor Standards Act of 1938, to-wit, between 41 and 44 inclusive, but were not paid time and one-half the regular rate, as required by the Act.

2. The pleadings further admit that the plaintiffs are employed as window cleaners and that a substantial portion of their work was performed on buildings whose occupants were engaged in the production of goods in interstate commerce.

3. There are no relevant or material questions of fact on which testimony need be taken, and that a trial is therefore not necessary.

4. That the pleadings have raised certain issues of law which, if decided favorably to the plaintiffs' contention, must result in judgment against the defendant, notwith-

standing that (for the purposes of this motion) all of the defenses set up in the defendant's answer, are taken as true.

5. The issues of law presented by the pleadings are as follows:

First: Whether a former employe may lawfully bring action against his former employer for wages and liquidated damages under the Fair Labor Standards Act of 1938, or whether such action is limited to present employes.

[fol. 15] Second: Whether window cleaning is a necessary maintenance operation on buildings.

Third: Whether employes of an outside contractor, engaged in the cleaning of windows on buildings in which goods in interstate commerce are produced, are *themselves* engaged in an occupation "necessary to the production of goods in interstate commerce" within the meaning of the Act.

Fourth: Whether an individual employe's right to bring action under Section 16 (b) of the Act is impaired by a collective bargaining contract entered into between the union to which the individual employe belongs and the employer, whereby neither the employer nor the union, nor its members had any contemplation that the employment involved comes under the Act, and whereby the parties provided in collective contract that time and one-half shall begin not at 40 hours, as provided by law, but at 44 hours.

Fifth: Whether the right of the plaintiff to bring this action is impaired by the fact that no demand for payment under the Act was made prior to the institution of suit.

Wherefor-, plaintiff prays that summary judgment on the pleadings be entered against the defendant and in favor of himself and all other persons similarly situated.

This motion is based on the records and files of this Court and cause and on the motion of Leon A. Cousens, hereto attached and made a part hereof.

Leon A. Cousens, Attorney for Plaintiffs.

[fol. 16] IN UNITED STATES DISTRICT COURT

OPINION OF THE COURT—Filed February 3, 1943

—Plaintiff has made a motion for summary judgment based on stipulation of facts and stipulation of issues of facts. Plaintiff is an employee of defendant which is engaged in washing windows of buildings in which interstate commerce was carried on or in which goods were produced for interstate commerce. He and others claim that they come under the Fair Labor Standards Act because they helped in the production of goods sold in interstate commerce and are entitled to time and one-half for work in excess of 42 hours, commencing October 24th, 1939 and ending October 24th, 1940. Defendant makes its contracts direct with the occupants of the particular place where the windows are to be washed and plaintiff claims the right to recover under Kirschbaum v. Walling, decided June 1st, 1942 and appearing in volume 316 U. S. Reports at 517.

Section 13 of the Fair Labor Standards Act provides:

> "(a) The provisions of sections 6 and 7 shall not apply to * * * (2) any employes engaged in any retail or service establishment the great part of whose selling or servicing is in intrastate commerce."

In the Kirschbaum case the court held that where the defendant company rented building space to clothing manufacturers who obviously were engaged in interstate commerce, furnishing with the building, plummers, electricians, elevators operators and porters, all of these came under the Fair Labor Standards Act just as though the firm so operating in interstate commerce had engaged them directly. In the Kirschbaum case, however, Justice Frankfurter disposes of the "service establishment" feature of defendant's claim by stating:

> "Selling space in a loft building is not the equivalent of selling services to consumers, and, in any event, the 'greater part' of the 'servicing' done by the petitioners here is not in intrastate commerce."

[fol. 17] It is well to note, however, that in the Court of Appeals decision of this same case, 124 Fed. (2nd) 572-3 the

court in suggesting illustrations of what Congress meant by "service establishments" specifically mentioned—

> "barber shops, beauty parlors, shoe-shining parlors, clothes pressing clubs, laundries, automobile repair shops."

Evidently, therefore that court with a broad and liberal interpretation of the Fair Labor Act in mind and desirous of accomplishing the objective of Congress on as broad a basis as possible, included "laundries" among those exemptions. Of course the court evidently meant "clothes laundries" but is there a great deal of difference between the ultimate functions of a laundry for clothes and a laundry for windows? What the Court of Appeals said, however, in quoting the foregoing illustrations from another decision is only dictum, but we believe there is a distinction between the facts in the Kirschbaum case and the facts here. In the Kirschbaum case the employees were all part of and went with the rental of the building. Kirschbaum wasn't furnishing "service" as such. But here the defendant was furnishing window washing and this in our opinion makes it obviously a service.

Evidently Congress anticipated the possibility of purely service establishments rendering service to those engaged in interstate commerce and those not so engaged. Otherwise why did it so word the exemption as to exclude those service establishments where the greater part of their service was done in intrastate commerce?

Therefore, this court believes that the Kirschbaum case is not applicable; that there is a difference basicly generating from the facts and that before plaintiff would be entitled to recover he would have to show that the greater part of the "servicing" engaged in by the employer is not in intrastate commerce. It may be that the burden of proof is on defendant but in any event this court must know whether defendant was engaged mostly in intrastate commerce or interstate commerce. In addition it may be well [fol. 18] for the parties to also show the percentage of the several work weeks where the employees participated in interstate commerce because it is recognized that an employee may be engaged in intrastate commerce one week and not the next.

The other question involved relates to the contract that was entered into by the union, of which the plaintiff is a

member, and defendant. The contract was obviously entered into under the supposition that the Fair Labor Standards Act did not apply to this species of labor. We do not decide that question. Our inclination is, however, that if a mistake was made in the legal interpretation of a statute aimed at the health and general welfare of anyone engaged in manual labor, that this court ought to correct it if possible and that under the decisions it would be our duty to so correct the status as to provide time and one-half for overtime in the event plaintiff is able to show that defendant is engaged for the greater part in furnishing its service to firms engaged in interstate commerce or in the production of goods for interstate commerce.

The motion for summary judgment is therefore denied and proofs will be taken unless the facts can be further stipulated.

Frank A. Picard, United States District Judge.

Dated: February 3rd, 1943.

IN UNITED STATES DISTRICT COURT

ADDITIONAL STIPULATION OF FACTS—Filed May 6, 1943

It is hereby stipulated and agreed by and between the parties to this cause, by and through their respective attorneys, that the following facts exist in addition to those previously stipulated between the parties:

[fol. 19] A. As a matter of fact, during the period here involved, the greater portion of the work done by the defendant corporation and by the parties plaintiff under direction of the defendant corporation, was for customers who were engaged in interstate commerce and most of whose employes were engaged in interstate commerce.

B. As a matter of fact, during the period here involved, the greater portion of the work done by the defendant corporation and by the parties plaintiff under the direction of the defendant corporation was for customers who were engaged in the production of goods for interstate commerce, and most of whose employes were engaged in the production of goods for interstate commerce or in occupations necessary to the production of goods for interstate commerce.

C. As a matter of fact, the foregoing is true both as to the volume of work done by the defendant corporation, in terms of money paid to the defendant corporation by its customers and as to the number of customers engaged in interstate commerce or in the production of goods for interstate commerce, as against those customers of the defendant not so engaged.

D. As a matter of fact, the work done by the defendant corporation on such buildings whose occupants were engaged in interstate commerce or in the production of goods for interstate commerce, was performed within the confines of the State of Michigan.

Leon A. Cousens, Attorney for Plaintiffs; Davidow and Davidow, by Larry S. Davidow, of Counsel for Defendant.

Dated at Detroit, Michigan, May 3, 1943.

[fol. 20] In United States District Court

Renewal of Motion for Summary Judgment—Filed June 15, 1943

To the Court:

The plaintiff renews the previous motion for summary judgment which was heretofore decided by this Court.

This motion is based on the records, pleadings, and the Stipulation of Fact, and in particular on the Further Stipulation of Facts recently filed in this Court and cause.

This motion is submitted on briefs, in accordance with instructions of the Court.

Leon A. Cousens, Attorney for Plaintiff.

In United States District Court

Opinion of the Court—Filed July 14, 1943

This opinion must be read in conjunction with the opinion rendered in the same matter February 3, 1943, in response to plaintiff's petition for a summary judgment in denying which the Court expressed itself as follows:

"Therefore, this Court believes that the Kirschbaum case is not applicable; that there is a difference basic-ly

generating from the facts and that before plaintiff would be entitled to recover he would have to show that the greater part of the 'servicing' engaged in by the employer is not in intrastate commerce. It may be that the burden of proof is on defendant but in any event this Court must know whether defendant was engaged mostly in intrastate commerce or interstate commerce."

[fol. 21] We quote the above because of the evident misunderstanding of plaintiff as to its interpretation. The important part of that paragraph to this Court is contained in the words:

"*But in any event* this Court must know whether defendant was engaged mostly in intrastate commerce or interstate commerce."

Admittedly the question here turns upon the interpretation to be given that part of Section 13 of the Fair Labor Standards Act, which is as follows:

"(a) The provisions of sections 6 and 7 shall not apply to * * * (2) any employee engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce."

We decided in our original opinion that defendant was a service establishment, so that question is out of the way. Obviously then in conformity with the law above if more than 50 per cent of its business was interstate commerce, then its employees were under the Act. But when this Court rendered its February 3, 1943 opinion it didn't know whether defendant actually sent its men out of the state to service customers; whether the greater percent of its customers were those who had their business here in Michigan but who were engaged in interstate commerce; or whether its business was a combination of the two. This Court did not bind itself, as intimated by plaintiff's counsel in his briefs, to any conclusions, simply because it was seeking facts. If more than 50 per cent of defendant's business was intrastate commerce, then the answer would have been simple; but because, as the facts stipulate, more than 50 per cent of its business was devoted to servicing customers engaged in interstate commerce or buildings where

the occupants thereof were engaged in interstate commerce, the question was entirely different and presented this Court with necessity for further deliberation and research.

The question here then is:

> "Is a service establishment engaged in interstate commerce because its employees (who do not go out [fol. 22] of the state to work) do render service to customers who are admittedly engaged in interstate commerce, which service indirectly aids those customers 'in the production of' their 'goods for interstate commerce' and which service amounts to more than 50 per cent of the service establishment's business?"

If the position contended for by plaintiff is a correct statement of the law, then a comparatively few people, service establishments or otherwise, would not be included as subject to the Fair Labor Standards Act. If rendering the service of washing windows in a building for occupants who are engaged in interstate commerce automatically makes the window washers engaged in interstate commerce it would be difficult under our complex economical and commercial life to conceive a situation where any workman would not come under the Act. From this conclusion it would be but another step to hold that a window washing company that served a hotel would have to find out from week to week what the occupants of the several hotel rooms did for a living, whom they were representing if their firms were engaged in interstate commerce. Soon the law's applicability would be "reductio ad absurdum."

And this was not the decision in Kirschbaum v. Walling, 316 U. S. Reports 517. There the window washers, janitors and elevator operators were part of the establishment that was rented to the company engaged in interstate commerce. But, on the other hand, we do believe that the decision in this action is governed by the rule laid down in Lonas v. National Linen Service Corporation decided June 22, 1943, by our own Sixth Circuit Court of Appeals, not yet in pamphlet form. There on 20 per cent of defendant business its employees actually went outside the state of its domicile, while 60 per cent of its service, although rendered within the state, was rendered to industrial firms. We believe we can assume that sufficient of those industrial concerns were engaged in interstate commerce to bring the

facts analogous to those in the case at bar. In fact, this claim was made by the administrator in the Lonas (supra) case, but the Court held that defendant's employees did not come under the act and we so hold here.

[fol. 23] May we not add that in rendering this opinion we are aware of the difference between the interpretative bulletins and instructions of the administrator evidenced by briefs of the respective parties as directed to our attention by plaintiff. But even if the difference is as controlling as claimed by plaintiff and while this Court has often recognized that the interpretations of the administrator are entitled to "great weight," U. S. v. American Trucking Associations, 310 U. S. 534, those interpretative bulletins are not the law. As stated by Judge Simons in Lonas v. National Linen Service Corporation, supra:

> "The administrator * * * contends that the exemptions in paragraph 13 (a) (2) are limited to establishments retail in character whether they sell goods or services. This view is based upon what he conceives to be the implications to be drawn from the legislative history of the Act and the grammatical construction of the exemption section. Since the related terms are coupled in the same sentence and are used in the disjunctive with the terms 'retail' and 'service' both modifying the word 'establishment' they refer to employers who deal directly with private consumers as distinguished from commercial and industrial customers. In other words, the service establishment exemption extends only to those establishments having the characteristic of retail stores, and the defendant's business is not a retail service establishment because 60 percent of its customers are industrial or business concerns.
>
> We find no support for this interpretation in the language of the exemption section. Two enterprises are therein exempted, one a retail establishment and the other a service establishment, the exemption of each subject to the condition that in the case of the retail establishment the greater part of its selling must be an intra-state commerce, and in the case of a service establishment, the greater part of its servicing must be in intra-state commerce. Had the Congress intended to limit the exemption of service establish-

ments to those which perform services for private in-
[fol. 24] dividuals as distinguished from business enterprises, it would have had little difficulty in clearly expressing such purpose."

A judgment in accordance with this opinion will be presented for our signature by defendant.

Frank A. Picard, United States District Judge.

Dated: July 14, 1943.

IN UNITED STATES DISTRICT COURT

JUDGMENT AND FINDINGS AT LAW—Filed August 30, 1943

At a session of said Court held in the Federal Building in the City of Detroit, Michigan, this 30th day of August, 1943.

Present: Honorable Frank A. Picard, United States District Judge.

This cause having come on to be heard upon the pleadings and stipulations of fact and on the petition of plaintiff for summary judgment, and upon argument of counsel in open court, followed by the submission of briefs, and the Court being fully advised in the premises, finds:

First: that the existence of a trade union contract between the defendant employer and the union to which plaintiffs belong, which contract was entered into and fully consummated in the mutual belief that the provisions of the Fair Labor Standards Act do not apply to the employees, can constitute no bar to the right of the employees to recover under Section 16 (b) of the Act if, as a matter of fact and as a matter of law, the Fair Labor Standards Act does apply.

Second: The right of employees to bring action under Section 16 (b) of the Fair Labor Standards Act cannot be
[fol. 25] waived by the employees since such right is given them not merely for their private benefit, but in order to effectuate a public policy. Consequently, the fact that the trade union contract under which the employees worked provided for standards different than those required by the Act, would constitute no defense to an employee suit under the Act if, as a matter of law, the employees were entitled to the benefits of the Act.

Third: The fact that some of the employees were no longer employed by defendant at the time suit was commenced would have no effect on their right to sue for such wages, if any, as they might be entitled to have received under the Act during their period of employment, if the Act did apply.

Fourth: It is not necessary for the proper determination of the issues raised herein that the Detroit Window Cleaners' Union be made a party to the suit.

Fifth: The right of plaintiffs to recover, if any, is not affected by a failure to make demand upon the defendant for payment under the Act, prior to the commencement of suit.

Sixth: The Court finds, however, that the defendant herein is a service establishment, the greater portion of whose servicing is in intrastate commerce, and that the defendant comes within the exemption covered by Section 13 (a) (2) of the Fair Labor Standards Act.

Therefore, it is ordered, adjudged and decreed that the plaintiffs recover nothing by reason of this action and that the complaint of the plaintiffs be, and the same is hereby dismissed.

Frank A. Picard, District Judge.

Leon A. Cousens, Attorney for Plaintiffs.
Leo Mandell, Attorney for Defendants. Davidow & Davidow, Attorneys of Counsel for Defendants.

[fol. 26] IN UNITED STATES DISTRICT COURT

NOTICE OF APPEAL—Filed September 25, 1943

Notice is hereby given that Thomas Martino, for himself and for others similarly situated, hereby appeals to the Circuit Court of Appeals for the 6th Judicial Circuit from the final judgment entered in said Court and cause on August 30, 1943.

Leon A. Cousens, Attorney for the Plaintiff.

In United States District Court

Appellant's Statement of Points—Filed October 29, 1943

To the Court:

The plaintiff and appellant will rely on the following points in his appeal of the captioned cause to the Circuit Court of Appeals for the Sixth Circuit.

1. That the District Court erred in holding that the defendant is a "service establishment" within the meaning of Sec. 13 (a) (2) of the Fair Labor Standards Act.

2. That the District Court erred in holding that plaintiff was "engaged in" a service establishment, in the face of stipulations of fact expressly agreeing that, although plaintiff was employed by defendant, the greater part of the work was performed in establishments admittedly engaged in the production of goods for interstate commerce.

3. That the District Court erred in dismissing the complaint because the stipulated facts show that plaintiff was engaged in an occupation necessary to the production of goods for interstate commerce, within the meaning of the Act.

[fol. 27] 4. That the District Court erred in dismissing the complaint on the ground that the defendant is a "service establishment," since the greater part of its servicing was for establishments engaged in the production of goods for interstate commerce, it therefore following that even if defendant was a "service establishment," it was not an exempt service establishment within the meaning of Sec. 13 (a) (2) of the Act.

5. That the Act is a remedial statute and the District Court erred in failing to give a liberal interpretation to coverage, and erred further in giving strict interpretation to an exemption, contrary to the rules of construction of remedial legislation.

Respectfully submitted, Leon A. Cousens, Attorney for Plaintiff and Appellant.

Dated at Detroit, Michigan, October 21st, 1943.

In United States District Court

Appellee's Statement of Points—Filed February 11, 1944

To the Court:

The defendant and appellee will rely on the following points contained in the judgment and findings at law from which a general appeal was filed by appellant:

(1) The District Court erred in finding that the existence of a trade union contract between the defendant employer and the union to which plaintiffs belong, which contract was entered into and fully consummated in the mutual [fol. 28] belief that the provisions of the Fair Labor Standards Act do not apply to the employes, can constitute no bar to the right of the employes to recover under Section 16 (b) of the Act if, as a matter of fact and as a matter of law, the Fair Labor Standards Act does apply.

(2) The District Court erred in finding that the right of employes to bring action under Section 16 (b) of the Fair Labor Standards Act cannot be waived by the employes since such right is given them not merely for their private benefit, but in order to effectuate a public policy. Consequently, the fact that the trade union contract under which the employes worked provided for standards different than those required by the Act, would constitute no defense to an employe suit under the Act if, as a matter of law, the employes were entitled to the benefits of the Act.

(4) The District Court erred in finding that it is not necessary for the proper determination of the issues raised herein that the Detroit Window Cleaners' Union be made a party to the suit.

(5) The District Court erred in finding that the right of plaintiffs to recover, if any, is not affected by a failure to make demand upon the defendant for payment under the Act, prior to the commencement of suit.

Davidow & Davidow, by Larry S. Davidow, Attorneys for Defendant and Appellee.

In United States District Court

Order Extending Time to Perfect Appeal—Filed October 29, 1943

Upon stipulation of counsel, it is ordered that the time allotted for the perfection of the appeal of the above entitled cause to the United States Circuit Court of Appeals for the [fol. 29] sixth Circuit be and is hereby extended fifty days beyond November 4, 1943.

Frank A. Picard, District Judge.

Approved as to form and contents:
Davidow & Davidow, Attorneys for Defendant and Appellee.

In United States District Court

Stipulation of Record on Appeal—Filed October 29, 1943

It is hereby stipulated and agreed by and between the above parties through their respective attorneys, in lieu of Designations of Record, that the following portions of the record in the captioned cause be printed on the appeal to the United States Circuit Court of Appeals for the Sixth Circuit:

1. Amended Complaint;
2. Amended Answer and Defenses of Defendant;
3. Stipulation of Facts and Stipulation of Issues of Fact;
4. Motion for Summary Judgment;
5. Opinion of the Court dated February 3, 1943;
6. Additional Stipulation of Facts;
7. Renewal of Motion for Summary Judgment;
8. Opinion of the Court;
9. Judgment and Findings of Law;
10. Notice of Appeal;
11. Stipulation of Record on Appeal;
12. Statement of Points;
13. Certificate of Court.

[fol. 30] It is further stipulated and agreed that all points and defenses raised by the defendant in its pleadings shall be reviewable.

Leon A. Cousens, Attorney for Plaintiff and Appellant. Davidow & Davidow, Attorneys for Defendant and Appellee.

Dated at Detroit, Michigan, October 14, 1943.

IN UNITED STATES DISTRICT COURT

ORDER EXTENDING TIME FOR FILING OF RECORD ON APPEAL—Filed December 17, 1943

Upon reading and filing the stipulation hereto attached, and sufficient reason therefor having been advanced by counsel,

It is ordered that the time for the filing of the record of the lower court is extended to and including February 24, 1944.

Florence E. Allen, Circuit Judge.

[fol. 31] IN UNITED STATES DISTRICT COURT

STIPULATION RE COMPARISON OF RECORD—Filed February 17, 1944

It is hereby stipulated by and between the attorneys for the respective parties hereto that the Record on Appeal as printed be certified and transmitted by the Clerk of the United States District Court for the Eastern District of Michigan to the United States Circuit Court of Appeals for the Sixth Circuit without comparison.

Leon A. Cousens, Attorney for Appellant. Davidow & Davidow, By Larry S. Davidow, Attorneys for Appellee.

Dated at Detroit, Michigan, this 17th day of February, 1944.

[fol. 32] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 33] In the United States Circuit Court of Appeals for the Sixth Circuit

Cause Argued and Submitted

(October 17, 1944—Before: Simons, Hamilton and Martin, J.J.)

This cause is argued by Leon A. Cousens for Appellant and by Larry S. Davidow for Appellee and is submitted to the court.

In United States Circuit Court of Appeals

Judgment—Entered October 18, 1944

Notwithstanding some more or less remote approaches to the present problem in *Kirschbaum* v. *Walling*, 316 U. S. 517, and *Warren-Bradshaw Drilling Co.* v. *Hall*, 317 U. S. 88, it is impossible for us to entertain the concept that window cleaning becomes interstate commerce, or is in pursuance of the production of goods for commerce, by the fact that the windows that are cleansed are in the manufacturing establishments of industries engaged in interstate commerce, nor are we able to reject the concept that a window cleaning company is a service establishment, under Sec. 13(a) of the Fair Labor Standards Act, even though the service it renders is not performed on its own premises. We adhere to our rationalization in *Lonas* v. *National Linen Service Corp.*, 136 Fed. (2d) 433. Cert. denied 320 U. S. 785; Wherefore,

The judgment below dismissing the appellant's suit for overtime pay based upon the provisions of the Act, is hereby Affirmed.

[fol. 34] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 35] Supreme Court of the United States

Order Allowing Certiorari—Filed June 18, 1945

The order entered February 26, 1945, denying certiorari herein is vacated and the petition for writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit is granted. The case is assigned for argument im-

mediately following No. 1933, Roland Electrical Co. v. Walling.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: Enter Daniel D. Carmell. File No. 49,302. U. S. Circuit Court of Appeals, Sixth Circuit. Term No. 21. Thomas Martino, Petitioner, vs. Michigan Window Cleaning Company. Petition for a writ of certiorari and exhibit thereto. Filed January 17, 1945. Term No. 21, O. T., 1945.

FILE COPY

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CHARLES ELMORE CROPLEY
CLERK

In the

Supreme Court of the United States

OCTOBER TERM, 1944

No. 49 21

THOMAS MARTINO,
Petitioner,
vs.
MICHIGAN WINDOW CLEANING COMPANY,
Respondent

PETITION FOR WRIT OF CERTIORARI

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In the

Supreme Court of the United States

OCTOBER TERM, 1944

No.....

THOMAS MARTINO,
Petitioner,
vs.
MICHIGAN WINDOW CLEANING COMPANY,
Respondent

PETITION FOR WRIT OF CERTIORARI

May It Please The Court:

Thomas Martino, for himself and for other persons similarly situated, respectfully petitions that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Sixth Circuit entered in this case October 18, 1944. This petition is submitted without a separate brief and necessarily analyses opinions of the courts of the various circuits and of this Court, in view of the fact that the conflict of opinions constitutes an essential basis for the granting of certiorari in this case.

OPINIONS BELOW

The judgment and findings of fact in the district court, 51 F. Supp. 505, are printed at R. 20 through R. 25. The judgment of the Circuit Court of Appeals is printed at R. 33.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on October 18, 1944 (R. 33). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether employes who spend the greater part of their time washing windows in buildings in which goods are produced for interstate commerce are "engaged in the production of goods for commerce" within the meaning of the Fair Labor Standards Act.

2. Whether employes of a window cleaning concern, who spend the greater part of their time cleaning windows for customers of their employer in buildings in which goods are produced for interstate commerce are "engaged in a retail or service establishment, the greater part of whose selling or servicing is in intrastate commerce" and are therefore exempt from the wage and hour provisions of the Fair Labor Standards Act.

3. Whether summary judgment was improperly granted by the court on the court's own motion.

STATUTE INVOLVED

The statute involved is the Fair Labor Standards Act, 52 Stat. 1060, 29 U. S. C., Sec. 201 *et seq.* Section 13 (a) (2), the interpretation of which is involved in this case, provides:

> "Sec. 13 (a) The provisions of Section 6 and 7 shall not apply with respect to * * * (2) any employe engaged in any retail or service establishment, the greater part of whose selling or servicing is in intrastate commerce."

Also here involved is the statutory definition of "produced":

> "Sec. 3. As used in this Act * * *.
>
> (j) 'Produced' means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act an employe shall be deemed to have been engaged in the production of goods if such employe was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary thereof, in any State."

STATEMENT

All the material facts are stipulated (R. 10 and R. 18). Petitioner brought suit for himself, 23 other named employes, and all other persons similarly situated, under Sec. 16 (b) of the Act, for overtime wages, liquidated damages, attorney fees, and costs on the basis of the following undisputed facts:

Respondent owns and operates a large window cleaning business. The greater part of the work is rendered for huge manufacturing and industrial plants, such as various units of General Motors Corporation. Under respondent's direction petitioners are assigned to such factories in which they are engaged in window cleaning, thereby not only keeping the factory clean to that event, but also facilitating the flow of natural light to the machines and assembly lines at which the factory's employes are at work.

The answer denied that the washing of factory windows is necessary to the production of goods for interstate commerce which takes place inside the factory. The petitioners would have presented an abundance of proof of this contention had not the district court dismissed the complaint on its own motion, without giving the plaintiffs an opportunity to present testimony. The trial court and the circuit court of appeals indicated that judicial notice would be taken that window cleaning is obviously necessary.

On November 23, 1942, the litigants entered into a stipulation of facts (R. 10) which showed that more than a substantial part of the work done by petitioners was on buildings in which goods were produced for interstate commerce. The district judge denied petitioner's motion for summary judgment, held that respondent was a service establishment and that

> "* * * under the decisions it would be our duty to so correct the status as to provide time and one-half for overtime in the event plaintiff is able to show that defendant is engaged for the greater part in furnishing its service to firms engaged in interstate commerce or in the production of goods for interstate commerce" (R. 18).

Thereupon an additional stipulation of facts was filed on May 6, 1943, which stated (R. 19):

> "A. As a matter of fact, during the period here involved, the greater portion of the work done by defendant corporation and by parties plaintiff under direction of defendant corporation, was for customers who were engaged in interstate commerce and most of whose employes were engaged in interstate commerce.
>
> "B. As a matter of fact, during the period here involved, the greater portion of the work done by defendant corporation and by parties plaintiff under direction of defendant corporation, was for customers who were engaged in the production of goods for interstate commerce, and most of whose employes were engaged in the production of goods for interstate commerce or in occupations necessary to the production of goods for interstate commerce."

Hence, the question raised by the district judge was specifically and affirmatively answer by stipulation of the parties. The court thereupon directed petitioners to renew their motion for summary judgment and thereafter rendered its opinion (R. 20) in which it held this time that since respondent is a "service establishment" it is of no consequence that the greater part of its servicing is rendered to customers engaged in the production of goods for commence; that to lose the exemption the service establishment would have to "send its men out of the state to serve customers."

If the district court had permitted testimony to be taken, rather than to dismiss the complaint on its own motion, petitioners would not have been denied the opportunity to directly establish the close and intimate tie between window cleaning and the production that takes place within the factories whose windows are cleaned. It

would have been shown that a vast business enterprise is here involved whose implications are direct to the intricate interstate network of the automobile manufacturing industry. The proofs would have shown that petitioners hardly ever see respondent's place of business: that they work in the factories, and indeed must comply with the self-same requirements of citizenship as the factory employes in order to gain admission to do their work and that they must be identified by the same type of identifying factory badge in order to get past the entrance gate. The proofs would have shown that respondent's customers have always deducted the cost of window cleaning from their respective gross incomes, for income tax purposes, as "ordinary and necessary expenses" under Sec. 23 (a) of the Internal Revenue Code. We would have shown that the cost of window washing is not absorbed by respondent's customers but has always been passed on as part of the price of their respective products. Moreover, the proofs would have shown that window cleaning has a direct and immediate relationship to safety and efficient workmanship on the part of the factory employes who work in the light of the windows that petitioners clean.

The Circuit Court of Appeals affirmed the dismissal of the complaint holding that (1) petitioners were not engaged in the production of goods for commerce because "it is impossible for us to entertain the concept that window cleaning becomes interstate commerce, or is in pursuance of the production of goods for commerce, by the fact that the windows cleaned are in the manufacturing establishments of industries engaged in interstate commerce" and (2) in any event, plaintiffs were within the 13 (a) (2) exemption.

REASONS RELIED UPON FOR ALLOWANCE OF WRIT

1. The decision of the District Court and of the Circuit Court of Appeals in the present case are in disregard of the decisions of this Court in *Kirschbaum v. Walling*, 316 U. S. 517, and in other cases.

2. The decisions of the lower courts in the present case are directly in conflict with those in other circuits.

3. The position taken in the present case is clearly erroneous. It disregards not only the opinions of this Court and of the other Circuit Courts of Appeal, but also the correct constructions given to them.

4. In view of the issues and of the stipulated facts in the present case, there was error in granting summary judgment for the defendant.

ARGUMENT

I.

THE DECISIONS OF THE COURTS BELOW ARE IN DISREGARD OP DECISIONS OF THIS COURT

This Court has repeatedly held that an employe engaged in an occupation necessary to the production of goods for commerce is entitled to the benefits of the Act regardless of the character of his employer's business. *Kirschbaum v. Walling* and *Arsenal Bldg. Corp. v. Walling*, 316 U. S. 517; *Warren Bradshaw Drilling Co. v. Hall*, 317 U. S. 88. In *Overstreet v. North Shore R. R.*, 318 U. S. 125, this Court became emphatic on this point, holding

> "The nature of the employer's activities is not determinative because, as we have repeatedly said, the application of the Act depends upon the character of the employee's activities."

This Court's decision in the *Kirschbaum-Arsenal* cases, *supra*, held within the Act employes of loft buildings who never left the state and whose employer's business was nominally intrastate, but who were engaged in rendering necessary service to tenants who were in turn engaged in production of goods for commerce. The Circuit Court below discarded and utterly set aside the holdings of this Court when it stated:

> "Notwithstanding some more or less remote approaches to the present problem in *Kirschbaum v. Walling*, 316 U. S. 517, and *Warren Bradshaw v. Hall*, 317 U. S. 88, it is impossible for us to entertain the concept that window washing becomes interstate commerce or is in the pursuance of the production of goods for interstate commerce, by the fact that the windows cleaned are in the manufac-

> turing establishments of industries engaged in interstate commerce * * *." (R. 33.)

During oral argument petitioner's counsel undertook to cite authorities on business management to demonstrate that window cleaning is necessary to any business enterprise that has windows. The court observed that the citation of such authorities was wholly unnecessary since judicial notice would be taken of that fact. The court acknowledged therefore that petitioners are *engaged in an occupation necessary to the production of goods for commerce*, yet held the Supreme Court's *Kirschbaum* decision to be "remote" in spite of the admitted fact that petitioners' function is to provide natural light and clean windows, whereas in the *Kirschbaum* case employes held to be under the Act provided artificial light and cleaned the floors.

There is yet another particular in which the courts below failed to follow decisions of this Court. Even if it be assumed that respondent is a "service establishment," this type of servicing has been held not to be "in intrastate commerce" within the meaning of the exemption. In the *Kirschbaum-Arsenal* cases, *supra*, the Court held that similar maintenance employes of a loft building company serving producers of goods for commerce within the building were engaged in production of goods for commerce, and therefore did not come under the Section 13 (a) (2) exemption because "in any event 'the greater part' of the 'servicing' done by the petitioner here [the loft building company] is not in intrastate commerce."

This holding was confirmed in *McLeod v. Threlkeld*, 319 U. S. 491, where the Court stated:

> "The contention that the work of the employes is covered by the exemption of 13 (a) (2) seems with-

out significance. *If the work is in interstate commerce, the exemption does not apply.*" (Emphasis supplied.)

Here, the stipulated facts show that the greater part of petitioners' work was performed for producers of goods for commerce and was therefore not "servicing in intrastate commerce" within the meaning of the exemption. Hence, under this Court's holding in the *McLeod* case petitioners should recover.

The very fact that petitioners are engaged in an occupation which, by virtue of Section 3 (j) *supra* is an element in the production of goods for commerce under the act (see *Kirschbaum v. Walling, supra, Walton v. Southern Package Corp.*, 320 U. S. 540, *Walling v. Soudock*, 132 Fed. 2nd 77 (CCA-5) cert. denied 318 U. S. 772) is sufficient to dispose of respondent's contention that it is a "service establishment" within the meaning of Section 13 (a) (2). Even if we assume that respondent is indeed a "service establishment", the exemption cannot apply because the "greater part" of its "servicing" is admittedly in interstate commerce.

II.

CONFLICT BETWEEN THE DECISION BELOW AND DECISIONS IN OTHER CIRCUITS

A. Conflict With the Second Circuit

When the Arsenal case was appealed to the Second Circuit that court expressly rejected the service establishment defense, saying that the term "service establishment" should perhaps

> "* * * be limited to those serving consumers directly, like tailors, or garages, or laundries; the juxtaposition of retail selling and servicing does indeed suggest as much." *Fleming v. Arsenal*, 125 Fed. (2nd) 278.

That decision was affirmed by this Court in 316 U. S. 517. In the case at bar the lower court adhered to its rationalization in *Lonas v. National Linen Service Corp.* 136 Fed. 2nd 433, cert. denied 320 U. S. 785. For reasons discussed on p. 19, we believe that the *Lonas* case presents a factual pattern at complete variance with the facts at bar and accordingly is not here binding. We submit, however, that the *Lonas* decision is in diametrical conflict with the position expressed by the Second Circuit in the *Arsenal* case, and is likewise in conflict with other circuits, as discussed *infra*. The court below held in the *Lonas* case, as quoted by the district judge in dismissing the case at bar (R. 23):

> "The administrator * * * contends that the exemptions in paragraph 13 (a) (2) are limited to establishments retail in character whether they sell goods or services. This view is based on what he conceives to be the implications to be drawn from the legislative history of the Act and the grammatical construction of the exemption section. Since the related terms 'retail' and 'service' both modifying the word 'establishment' they refer to employers who deal directly with private consumers as distinguished from commercial and industrial customers. In other words, the service establishment exemption extends only to those establishments having the characteristics of retail stores * * *.
>
> "We find no support for this interpretation in the language of the exemption section. * * *"

We are aware that certiorari was denied by this Court in the *Lonas* case. It may be noted, however, that since that denial* the Fourth Circuit has twice taken a position op-

*No inference may be drawn from the denial. As this Court held in *U. S. v. Carver*, 260 U. S. 482, quoted in *Atlantic Coast Line Railroad Co. v. Poyce*, 283 U. S. 401: "But the denial of a Writ of Certiorari imports no expression of opinion upon the merits of the case, as the Bar has been told many times."

posite to that above quoted, in *Guess v. Montague*, 140 Fed. (2nd) 500 and *Walling v. Roland Electrical Co.*, decided Jan. 3, 1945, and not yet in pamphlet form, both of which are discussed later on.

The conflict between the circuits is emphasized by the decision of District Judge Rifkind (Southern District of New York) in *Phillips v. Star Overall Dry Cleaning Co.*, 55 F. Supp. 238, which held the *Lonas* theory inapplicable on the ground that it was in conflict with the *Arsenal* (CCA-2) *Kirschbaum* (CCA-3) and *Guess* (CCA-4) cases.

The petitioners here present a stipulated fact which takes them outside the *Lonas* case entirely, namely, that they are not ENGAGED IN a "service establishment"; that if respondent is indeed a service establishment, petitioners are employed by it, but *engaged in* factories which produce goods for interstate commerce. This point is discussed in greater detail below.

The Courts below seemed concerned that the relationship of petitioners' work to commerce is remote. However, in *Borella v. Borden Co.*, decided July 28, 1944, by the Second Circuit, certiorari applied for Nov. 16, 1944, that court held covered by the act workers twice removed from the actual physical production of goods.

There maintenance workers were employed in doing maintenance work on a building owned by their employer which was occupied by the executive and administrative employes of the company. In the casual meaning of the word, these maintenance employes were farther removed from "production" than petitioners here. Neither they nor the occupants of the building came into physical contact with the goods at any stage of their production. Since, however, they were "necessary to the production", they were held covered by the act. This decision, which

cannot be reconciled with the decision below, should in and of itself provide sufficient reason for the granting of the writ here sought.

The Circuit Court of Appeals for the Second Circuit has reaffirmed its position in the recent case of *Fleming v. Post* decided December 14, 1944, and reported in 9 Labor Cases 62,450. In this case the Court said:

> "That maintenance employees of a building in which tenants are engaged in the manufacture of goods for interstate commerce are within the Act is too well established for dispute."

And the Court said:

> "In determining whether a substantial portion of the building is occupied by tenants engaged in the production of goods for interstate commerce, we have adopted the measure of 20% suggested by the Administrator. See *Callus v. 10 East 40th Street Building, Inc.* (CCA-2 December 12, 1944), 9 Labor Cases 62,445."

The results so reached are directly opposed to the position taken by the courts below in the present case.

B. Conflict with the Third Circuit

In *Kirschbaum v. Walling*, 124 Fed. 2nd 567, the Third Circuit held:

> "* * * By 'service establishment' Congress intended that type of establishment which has the ordinary characteristics of a retail establishment except that it sells services instead of goods."

This decision was likewise affirmed by this Court 316 U. S. 517. And patently, if the Third Circuit was correct there, the Sixth Circuit was incorrect in taking the opposite view in the *Lonas* case and in the case at bar.

C. Conflict with the Fourth Circuit

Subsequent to the handing down of the *Lonas* decision in the Sixth Circuit, the Fourth Circuit was called upon to decide a similar question in *Guess v. Montague,* 140 Fed. 2nd 500. It deliberately chose to follow the Second and Third Circuits and disregarded the Sixth when it held:

> "On the principle *noscitur a sociis* the service establishment contemplated by the exemption must be the same sort as a retail establishment * * * that is, it must be one selling services to consumers. The exemption does not extend to manufacturing or processing goods for sale, or to production within the meaning of Sec. 3 (j)."

And if any doubt were to remain that the decisions below conflicts with the position of the Fourth Circuit, that doubt would be completely removed by that court's disposition of *Walling v. Roland Electrical Co.,* reversing the District Court's dismissal of the complaint on the *Lonas-Martino* theory. The reasoning of the Fourth Circuit here is clearly inconsistent with that of the Sixth Circuit on all of the principal points involved in the two cases:

1. The court held that employes of a concern, the greater part of whose business consisted in the repair, rebuilding, and reconditioning of motors and in the installation, relocation, extension and repair of electrical wiring used in the production of goods for interstate commerce, were engaged in the production of goods for commerce within the meaning of the act.

2. The court held that such a concern is not a service establishment within the meaning of Sec. 13 (a) (2). And while it might be argued that the repair of machinery is more "necessary" to production

than the maintenance of natural illumination through the cleaning of windows, the Fourth Circuit's reasoning clearly applies to the case at bar and is inconsistent with that of the Sixth Circuit.

3. The court held that the company was not a "retail or service establishment within the meaning of the act" since "the labor of its employees was performed almost altogether in rendering service to commercial and industrial concerns, where the cost of the service would not be absorbed by the one to whom they were rendered but would be passed on as a part of the price of the product."

4. Finally, the court held that "even if the company could be held to be a service establishment within the meaning of this exemption, the greater part of its servicing was not in intrastate commerce, but in the production of goods for interstate commerce, and the exemption did not apply to it for that reason." Judge Parker quoted at length from Judge Learned Hand's opinion in *Fleming v. Arsenal Building Corp.*, 125 Fed. (2nd) 278, and relied on this Court's decisions in *Kirschbaum v. Walling* and *McLeod v. Threlkeld*. Since petitioners are likewise engaged in the production of goods for commerce, the *Roland Electrical* decision is squarely contrary to the decision of the lower courts in the case at bar.

Indeed, the conflict was pointed up by the court itself when it observed, "* * * **if these decisions**—*Lonas* and *Martino*—**are accepted as sound law**, we think they are clearly distinguishable from the case at bar in that the services here were more clearly in furtherance of the production of goods for commerce and the establishment is more clearly not a retail or service establishment within

the meaning of the act." (Emphasis supplied.) On the other hand, this Court, in *Armour & Co. v. Wantock*, ... U. S. .... (decided Dec. 4, 1944) declined to give an "unwarranted rigidity to the application of the word 'necessary' which has always been recognized as a word to be harmonized with its context. See *McCulloch v. Maryland*, 4 Wheat. 316, 413, 414."

D. Conflict With the Fifth Circuit

The Fifth Circuit was called upon to decide a question almost identical with that presented in the case at bar in *Sondock v. Walling*, 132 Fed. (2nd) 77, cert. denied 318 U. S. 772. The only factual difference was that there the employes in question were plant guards, while here they are window cleaners. In both cases they were employed by outside contractors who assigned them to render their respective services to industrial plants in which goods were produced for interstate commerce. In neither case did any of the parties cross state lines and in neither case did any of the parties actually handle any of the goods produced. If there is a difference, it is that in the case at bar a greater portion of the work was rendered in buildings in which goods were produced for commerce, whereas in the *Sondock* case only a "substantial" amount of such work was shown. The sole claim to coverage in both cases was that, regardless of the character of the employer's business, the occupations in which the employes were engaged were necessary to the production of goods for commerce. Yet, opposite results were arrived at by the respective circuits.

E. Conflict With the Ninth Circuit

The lower court also conflicts with the decision of the Ninth Circuit in *Consolidated Timber Co. v. Womack*, 132

Fed. (2nd) 101, where coverage was granted to employes whose sole relation to commerce was that they cooked for lumberjacks in a lumber camp. In disposing of the service establishment defense, the court held:

> "* * * It here occurs to us that perhaps it may not truthfully be said that the greater part of the servicing of either cookhouse was in intrastate commerce. Was not the greater number of diners at the cookhouse engaged in the production of goods for commerce? Were not the cookhouses an integral part of an organization devoted to the production of goods for commerce? Does it not follow logically and reasonably, that the greater part of the service rendered by the cookhouse was in interstate commerce rather than intrastate?"

III.

IMPORTANCE OF THE QUESTIONS PRESENTED

Viewed on a nation-wide basis, the number of employes effected by this decision runs into many thousands. The issue here involves more than merely window cleaners. It involves an infinite number of workers whose activities are necessary to the production of goods for commerce, but whose pay checks are signed by an independent contractor. The courts below having accepted, by judicial notice, the proposition that petitioners' work is necessary, the question is whether respondent and a multitude of similarly situated employers are to succeed, as respondent has thus far succeeded, in using Section 13 (a) (2) of the act as a barrier behind which they may pollute the channels of commerce with goods produced on sub-standard wages.

In view of the conflict between the circuits no one knows presently whether such employes are within or without

the act. On Oct. 18, 1944, the Sixth Circuit tells us that window washers are out. Nine days later a District Court in Chicago tells us that they are in. *Bittner v. Chicago Daily News Printing Co.*, 7 Wage Hour Reporter 1123. The arena of industrial competition is the entire nation. Our unions are nation-wide and the pattern of collective bargaining is national. Yet we have one Federal law in Detroit and an entirely opposite Federal law in Chicago. How, unless the Supreme Court grants certiorari and tells the Nation which is and which is not the law, are both labor and management to make proper plans? How are they to know their respective rights and obligations?

As matters now stand both parties to the collective bargaining process must be burdened with well justified doubts as to the applicable law. Honest and law-abiding employers must be plagued with uncertainty lest on the one hand they accept a law which may not apply to their business and thereby increase their operating costs, or whether they proceed on the assumption that the act does not apply and face the possibility of Sec. 16 (b) suits later on.

The well being of the building maintenance industry requires that the Nation be told by the highest court in the land what the applicable law really is.

IV.

THE DECISION BELOW IS ERRONEOUS

The courts below entirely disregard the statutory requirement that before a defendant may be exempted as a service establishment "he must affirmatively prove that in addition to being a service establishment, the greater part of the servicing of the defendant is in intrastate com-

merce. *Fleming v. Hawkeye Pearl Button Co.*, 113 Fed. (2nd) 52, 56 (CCA-8), *Consolidated Timber Co. v. Womack*, 132 Fed. (2nd) 101, 106 (CCA-9). The act being remedial, all employers who claim exemptions "must bring themselves within both the letter and the spirit of the exemptions since they are subject to strict construction." *Bowie v. Gonzales*, 117 Fed. (2nd) 11, 16 (CCA-1; *Piedmont & Northern Ry. v. Interstate Commerce Comm.*, 286 U. S. 289, 311; *Fleming v. Palmer*, 123 Fed. (2nd) 749, 762 (CCA-1).

Despite the foregoing requirement, the record here contains an unequivocal stipulation that the greater part of the work done by defendant corporation was for customers engaged in interstate commerce AND ALSO that *the greater part of the work done by defendant corporation was for customers engaged in THE PRODUCTION OF GOODS FOR INTERSTATE COMMERCE.* R. 18-19.

Respondent has not sustained the burden of establishing the exemption. The record is absolutely barren of any intrastate servicing whatever. The *Lonas* case, on the basis of which the courts below dismissed the complaint in the case at bar, decided only two specific questions, first, that *a service establishment does not alter in character because its customers are industrial concerns rather than private consumers.* In the *Lonas* case the court based its findings on the pleaded facts when it said:

> "The court dismissed the complaint on the ground that the pleaded facts, accepted as true, show that defendant is a service establishment the greater part of whose servicing is in intrastate commerce, and sections 6 and 7 of the Act therefore have no application to its employes."

It should be noted that the court accepted as true that the defendant in the *Lonas* case was a service establish-

ment, "the greater part of whose servicing is in intrastate commerce." Here the opposite fact is true.

The second and primary holding in the *Lonas* case was to reject the Administrator's argument that the exemption in Sec. 13 (a) (2) is limited to establishments retail in character, whether they sell goods or services, and as the court there said,

> "In other words (so claims the Administrator) the service establishment exemption extends only to those establishments having the characteristics of retail stores, and the defendant's business is not a retail service establishment because 60% of its customers are industrial or business concerns.
>
> "We find no support for this interpretation in the language of the exemption section."

In other words, the court held that the exemption applies to one who sells its services to large industrial concerns alone and it is still a retail establishment even if it does not sell its services to the general public. Thus, the *Lonas* case merely defined what is a service establishment.

Even if the foregoing is a correct interpretation of Congressional intent, the facts at bar bear little similarity to those in the *Lonas* case. Here the record shows that the greater portion of the work was done for factories which were engaged in the production of goods for commerce. The Lonas record showed 60% of the work rendered for "industrial or business establishments" and the court accepted as true that "the pleaded facts show that defendant is a service establishment the greater part of whose servicing was in intrastate commerce."

In the case at bar the attitude of the District Court and of the Circuit Court in affirming the former's decision without opinion is based on a misapprehension as to the

intention of Congress in writing Sec. 13 (a) (2) into the act. This Court has already defined that detail of Congressional intent in *Walling v. Jacksonville Paper Co.*, 317, U. S. 564 at 571:

> "It is quite clear that the exemption in Section 13 (a) (2) was added to eliminate those retailers located near the state lines and making some interstate sales."

The decision below goes beyond this intent. It broadens the scope of the exemption by:

1. Extending it to cover establishments whose servicing is rendered to industrial concerns, rather than to private consumers, as indicated by the juxtaposition of the words "retail or service" in the exemption section.

2. Extending it to cover an establishment the greater part of whose "servicing" (if indeed respondent's work is "servicing" within the exemption) is rendered for factories engaged in the production of goods for commerce.

3. Effectually reading out of the exemption section the modifying words "the greater part of whose selling or servicing is in intrastate commerce".

We submit that the lower court has hardly complied with the canon of construction of remedial legislation which requires liberal interpretation as to coverage and strict interpretation as to exemptions. Thus in *Bowie v. Gonzales*, 117 Fed. (2nd) 11, the First Circuit held:

> "Being a remedial statute, the appellants must bring themselves within both the spirit and the letter of the exemptions, since they are subject to strict construction."

So also the Eighth Circuit in *Fleming v. Hawkeye Pearl Button Co.*, 113 Fed. (2nd) 52, in which that circuit quoted this Court in support of its giving liberal construction to the Act:

> "Sec. 13 (a) (5) creates an exemption to the general scope of the Act and hence is subject to strict construction. In *U. S. v. Dickson*, 10 L. Ed. 689, it is said 'In short, a proviso carves special exemptions only out of the enacting clause; and those who set up any exemptions must establish it as being within the words as well as the reason thereof.' "

In the lower court's disposition of the case at bar the opposite position was taken. Much less than giving the exemption section strict interpretation, the court interpreted the language "*engaged in* any retail or service establishment" to mean "*employed by* any retail or service establishment". The stipulated facts (R. 10-11) show that petitioners, although EMPLOYED BY respondent, were not ENGAGED IN respondent's establishment, but in the establishments of respondent's customers such as General Motors factories which admittedly can hardly be called "service establishments". The decision therefore either broadens the exemption by construing the words "engaged in" to mean "employed by", or in the alternative, hypothecates the fiction that respondent's "establishment" includes not only its own place of business, but the places of business of its customers, a position that is utterly without substantiation in the record. Whichever was the court's rationale, the error is reversible.

V.

THE DECISION BELOW CONFLICTS WITH THE INTERPRETATIVE BULLETIN OF THE ADMINISTRATOR OF THE WAGE AND HOUR DIVISION

Although we do not contend that the opinions of the Administrator of the Wage and Hour Division are the law, this Court has repeatedly said that the interpretative bulletins of the Administrator are entitled to great weight. *U. S. v. American Trucking Associations*, 310 U. S. 534. More recently, this Court, speaking through Mr. Justice Jackson in *Skidmore et al. v. Swift & Co.* on Dec. 4, 1944, held:

> "We consider that the rulings, interpretations, and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, to constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend on the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier pronouncements, and all those factors which give it power to persuade, if lacking power to control."

Prior to argument the Administrator petitioned the Circuit Court below for and was granted leave to submit a brief *amicus curiae*. Here the Administrator expressed a position almost identical with that taken by petitioner in which he urged that the District Court's decision be reversed with direction to enter judgment for petitioner. Much less than consider and dispose of this position, the Circuit Court below did not as much as acknowledge that a brief *amicus* has been filed. From the fact that no opinion was written and from the extreme brevity of the

order affirming the District Court's decision, we are constrained to suggest that no weight whatever was given to the Administrator's position.

In Section 27 of Interpretative Bulletin No. 6 we find

> "* * * establishments which perform a substantial amount of work for industrial or business users, government agencies, institutions, and similar customers may not be considered service establishments. A service establishment is one which performs service for private individuals for personal or family use."

and in Section 23:

> "* * * Service establishments are usually local in character, are usually open to the general consuming public and usually render a service to private individuals for direct consumption. The service is usually rendered in small quantities for private use rather than for industrial and business purposes. Further, the service is usually rendered at a 'retail' price."

Section 24 gives a number of typical examples of service establishments and then goes on to say

> "* * * These establishments operate in the same manner as retail establishments and have substantially the same attributes. The principal difference is that their revenue is derived primarily from the sale of service instead of from the sale of merchandise."

The foregoing interpretations have found support in decisions in several of the circuits. *Fleming v. Arsenal,* 125 Fed. (2nd) 278 (CCA-2), *Kirschbaum v. Walling,* 124 Fed. (2nd) 567 (CCA-3), *Guess v. Montague,* 140 Fed. (2nd) 500 (CCA-4), *Sondock v. Walling,* 132 Fed. (2nd) 77 (CCA-5), cert. denied 318 U. S. 772, and *Consolidated Timber Co. v. Womack,* 132 Fed. (2nd) 101 (CCA-7).

On the other hand the decisions of the Sixth Circuit in the *Lonas* case *supra* and in the case at bar reject the

administrator's interpretations and are in direct conflict with the foregoing authorities. It therefore follows that not only must the public face confusion as to the applicable law, but in addition, the Administrator of the Wage and Hour Division must be handicapped in the fulfillment of the task entrusted to him by Congress in enforcing the act. As our 48 States are one Federal Union, we should have one Federal law, applicable in all the circuits.

CONCLUSION

It is therefore respectfully submitted that this petition for a writ of certiorari should be granted.

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No. 21

Supreme Court of the United States

OCTOBER TERM, 1945

THOMAS MARTINO,
PETITIONER,

vs.

MICHIGAN WINDOW CLEANING COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITIONERS' BRIEF

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITIONERS' BRIEF

OPINIONS BELOW

The opinion (R. 17-21) of District Judge Frank A. Picard dismissing the complaint is reported at 51 F. Supp. 505. Judge Picard's first opinion may be found at R. 14-16 and his Judgment and Findings At Law at R. 21-22.

The judgment of the Circuit Court of Appeals for the Sixth Circuit (before Simons, Hamilton, and Marton, JJ.) affirming the District Court (R. 27) is reported at 145 F. (2d) 163.

JURISDICTION

The judgment of the Circuit Court of Appeals was rendered on October 18, 1944 (R. 27). Certiorari was granted by this Court on June 18, 1945. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether employees of a window cleaning concern who spend the greater part of their time cleaning windows for customers of their employer in buildings in which goods are produced for interstate commerce are "engaged in a retail or service establishment, the greater part of whose selling or servicing is in intrastate commerce" and are therefore within the exemption provided by Section 13 (a) (2) of the Fair Labor Standards Act.

2. Whether employees of a window cleaning concern who spend the greater part of their time cleaning windows in buildings in which goods are produced for interstate commerce are engaged in "any process or occupation necessary to the production" of goods for commerce within the meaning of the Fair Labor Standards Act.

3. Whether judgment dismissing the complaint on the court's own motion was proper.

STATUTE INVOLVED

The pertinent provisions of the Fair Labor Standards Act of 1938 (52 Stat. 1060, 29 U.S.C. Sec. 201. et seq.) are set forth in Appendix I, *infra*, pp. 34-35.

STATEMENT

This case arises from an action filed by Thomas Martino for himself and in a representative capacity in behalf of 23 other employees similarly situated, under Section 16 (b) of the Fair Labor Standards Act of 1938, in the District Court of the United States for the Eastern District of Michigan, Southern Division, to recover unpaid overtime compensation, liquidated damages, attorney's fee, and costs.

Respondent is a Michigan corporation engaged in the business of cleaning windows in industrial buildings located in the State of Michigan (R. 16). Petitioners were employed by respondent as window cleaners and assigned to clean windows in various commercial and industrial buildings whose occupants were under contract with respondent for such work (R. 9). Most of these customers, such as various units of General Motors Corporation, were "definitely engaged in the production of goods for interstate commerce" (R. 9, 16). It is admitted that the greater portion of the work done by petitioners and by respondent was performed on buildings in which production of goods for interstate commerce was carried on, and that this was true measured in terms of receipts from business, in terms of volume of work done, and in terms of the number of customers under contract (R. 17).

Despite the provisions of the Fair Labor Standards Act which require payment of time and one-half for more than 42 hours in any workweek beginning October 24, 1939 and for more than 40 hours in any workweek beginning October 24, 1940 (Sec. 7(a) *infra*, p. 35) petitioners were not paid time and one-half until after 44 hours of work.

A stipulation (R. 16-17) was entered into in the district court that:

> "B. * * * the greater portion of the work done by [respondent] and by [petitioners] under direction of [respondent] was for customers who were engaged in the production of goods for interstate commerce and most of whose employees were engaged in the production of goods for interstate commerce or in occupations necessary to the production of goods for interstate commerce.
>
> "C. * * * the foregoing is true both as to the volume of work done by [respondent], in terms of

> money paid to [respondent] by its customers and as to the number of customers engaged in interstate commerce or in the production of goods for interstate commerce as against those customers of [respondent] not so engaged."

At the direction of the district judge, petitioners renewed a motion for summary judgment (R. 17). The district judge denied the motion, holding that respondent is a service establishment and that petitioners' work, even when performed for producers of goods for interstate commerce, did not constitute servicing in commerce (R. 17-21). At the same time the court dismissed the complaint (R. 21-22).

Petitioners thereupon appealed (R. 22) to the Circuit Court of Appeals for the Sixth Circuit, which affirmed the dismissal without opinion (R. 27).

SPECIFICATION OF ERRORS WHICH ARE URGED

It is submitted that:

1. The courts below erred in holding that petitioners, who are employed by a window cleaning concern, and who spend the greater part of their time cleaning windows for customers of their employer in buildings in which goods are produced for interstate commerce, are "engaged in a retail or service establishment, the greater part of whose selling or servicing is in intrastate commerce," and that the employer is therefore within the exemption of Section 13(a) (2) of the Fair Labor Standards Act.

2. The courts below erred in holding that petitioners, who spend the greater part of their time cleaning windows in buildings in which goods are produced for interstate commerce, are not engaged in "any process or occupation

necessary to the production" of goods for commerce within the meaning of the Act.

3. The district court below erred in dismissing the complaint on its own motion although no proofs had been taken.

SUMMARY OF ARGUMENT

Petitioners are not engaged in a service establishment within the exemption provided by Section 13 (a) (2) of the Act, for a number of reasons. Work that is in commerce or in the production of goods for commerce is outside the purview of an exemption intended to exclude services rendered to the consuming public. The type of service contemplated by the Act is that offered by tailor shops, beauty parlors, and the like.

The service establishment intended by the exemption is one in which the service is rendered in its own establishment, and a service which entails sending employees into the establishments of customers is not exempted. Respondent is not a service establishment because, by the very nature of its business, it has no service to render in its own establishment. It can operate only by assigning its employees to work elsewhere.

In any event the greater part of its work is rendered in establishments of those of its customers who are engaged in the production of goods for interstate commerce, so that even if respondent could be called a service establishment, it would still be outside the exemption.

Petitioners are engaged in a "process or occupation necessary to the production" of goods for commerce within the meaning of the Act. Factory windows must be cleaned, lest the depreciation of daylight interfere with production or, in the alternative, necessitate increased reliance on arti-

ficial light, which in turn adds to the cost of production. The work of window cleaning is necessary to health and safety of factory workmen. Clearly if petitioners had been employed directly by respondent's customers, they would have been covered by the Act. Excluding them because of the interjection of an independent contractor must therefore open the door to evasion of a remedial Act which requires liberal interpretation.

Judgment was improperly entered below dismissing the complaint on the court's own motion since no proofs had been taken, although on the stipulated facts summary judgment should have been entered for petitioners.

ARGUMENT

I.

PETITIONERS ARE NOT ENGAGED IN A SERVICE ESTABLISHMENT WITHIN THE EXEMPTION PROVIDED IN SECTION 13 (a) (2)

Section 13 (a) (2) of the Act provides in part that:

> "The provisions of Sections 6 and 7 shall not apply with respect to * * * (2) any employe engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce * * * "

In order to receive the benefit of this exemption, respon- must meet three requirements:

FIRST the service rendered must be the kind of service contemplated by the Act.

SECOND the greater part of servicing must be in intra- state commerce.

THIRD the servicing must be rendered in a service es- ment.

These will be discussed in order.

1. The Act does not contemplate exemption of industrial services.

The word "service" is easily susceptible to misconstruction. Every worker with hand or brain sells his services. The metal polisher who finishes fenders in a Fisher Body plant, the Dodge worker who assembles motors, the Ford workers who grind pistons—all sell their services to their respective employers. Obviously the word "service" calls for delineation. And as the Sixth Circuit held in a case in which a newspaper publishing company sought to claim the exemption,

> * * * In the broader sense, every business is of service to the public, but as the term "service" is used in the Act the type of business exempted as a service establishment is comparable to barber shops, beauty parlors, shoe shining parlors, clothes pressing clubs, laundries, automobile repair shops, or the like. *Sun Publishing Co. v. Walling*, 140 F. (2d) at 447.

And as the Administrator of the Act says in Interpretative Bulletin No. 6[1], after listing in Section 29 (p. 9) a large variety of industrial and business concerns,

> 30. In a broad sense every business performs service, yet no one would seriously urge that all types of businesses were eligible for exemption under section 13 (a) (2). It would be surprising indeed if Congress had intended by the one word "service" as used in the phrase "retail or service establishment" to grant an exemption broad enough to include all the above mentioned classes of business, and there is nothing in the legislative history of section 13 (a) (2) to support such a conclusion.

And in section 27 (p. 8) of this Bulletin we find:

> * * * establishments which perform a substantial amount of work for industrial or business users, government agencies, institutions, and similar customers may not be considered service establishments. A service establishment is one which performs service for private individuals for personal or family use.

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[1] This Court has repeatedly said that the interpretative bulletins of the Administrator are entitled to great weight. *U. S. v. American Trucking Associations*, 310 U. S. 534. And more recently, in *Skidmore et al v. Swift & Co.*, 65 S. Ct. 161, this Court held that "We consider the rulings, interpretations, and opinions of the Administrator under the Act, while not controlling upon the courts by reason of their authority, to constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend on the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier pronouncements, and all those factors which give it power to persuade, if lacking power to control."

And in section 23 (p. 7):

> * * * Service establishments are usually local in character, are usually open to the general consuming public and usually render a service to private individuals for direct consumption. The service is usually rendered in small quantities for private use rather than for industrial or business purposes. Further, the service is usually rendered at a "retail" price.

Section 24 (p. 7) gives a number of typical examples of service establishments and then goes on to say:

> * * * These establishments operate in the same manner as retail establishments and have substantially the same attributes. The principal difference is that their revenue is derived primarily from the sale of service instead of from the sale of merchandise.

This Court drew the distinction in *Phillips v. Walling*, 323 U. S. — between the type of establishment contemplated by the exemption and the type of enterprise operated by respondent. In that case the exemption was claimed by a chain store enterprise with respect to its warehouse employes as well as its retail store employes. And this Court said:

> * * * from the standpoint of its legislative ancestry, Sec. 13 (a) (2) is the offspring of a manifest desire to exclude from the scope of the Act "business in the several states that is of a purely local nature." * * * Congress was interested in exempting those regularly engaged in local retailing activities and those employed in small retail establishments epitomized by the corner grocery, the drug store, and the department store.

But the circuit court below went far beyond this area in holding that it was unable "to reject the concept that a window cleaning company is a service establishment, under Sec. 13(a) of the Fair Labor Standards Act, even though the service it renders is not performed on its own premises. We adhere to our rationalization in *Lonas v. National Linen Service Corp.*, 136 F. (2d) 433. Cert. denied 320 U.S. 785[2]." (R. 27.) There is wide factual variance between the *Lonas* case and the case at bar. The *Lonas* record showed 60% of the work rendered for "industrial or business establishments," and for aught the court might know most of these customers might have been purely local concerns such as barber shops or retail stores. In the case of respondent, on the other hand, it is admitted (R. 16-17) that *the greater part of the work done by both petitioners and respondent was for factories engaged in the production of goods for interstate commerce.* Another pivotal difference is that if the *National Linen Service Corp.* was a service establishment, its employees were undeniably *engaged in* it. On the other hand, if respondent is a service establishment, petitioners are undeniably employed by it, but engaged elsewhere, the very nature of their work taking them into factories with which respondent is under contract.

There is yet another difference. The *Lonas* decision was based on the belief that the normal functions of a laundry and linen supply company are indistinguishable from the businesses, uniformly regarded as falling within the exemption, such as barber shops, beauty parlors, shoe shining parlors, clothes pressing clubs, laundries, automobile repair shops, or the like, (*Sun Pub. Co. v. Walling, supra; Flem-*

[2] No inference may be drawn from the denial. As this Court held in *U. S. v. Carver*, 260 U. S. 482, quoted in *Atlantic Coast Line R. R. Co. v. Powe*, 283 U. S. 401, "But the denial of a Writ of Certiorari imports no expression of opinion upon the merits of the case, as the Bar has been told many times."

ing v. Kirschbaum, 124 F. (2nd) 567 (CCA 3); *Bracey v. Luray*, 138 F. 2nd 8 (CCA 4); *Guess v. Montague*, 140 F. (2nd) 500; (CCA 4) and upon the fact that laundries and linen supply companies have been included among such busineses by "Federal Departments and Agencies, as well as by trade associations and the public." See 136 F. (2d) at 434.

But respondent's business has not been classified by Federal agencies in the same category as laundries, barber shops, and other personal service businesses. On the contrary, the 1939 Census lists "window cleaning services" under "Business Services", along with "protective agencies" and "detective agencies" such as defendants in the *Sondock* case and other cases cited *infra* on p. 19, "auctioneers' establishments" (held outside the exemption in *Fleming v. Kenton Loose Leaf Tobacco Warehouse Co.*, 41 F. Supp. 255 (E.D.Ky.); *Walling v. Lincoln Loose Leaf Tobacco Warehouse Co.*, 6 Wage Hour Rept. 68 (E.D. Ten., 1943); *Walling v. Home Loose Leaf Tobacco Warehouse Co.*, 51 F. Supp. 914 (E.D. Ky)), "messenger services" (held outside the exemption in *Walling v. Allied Messenger Service*, 47 F. Supp. (S.D. N.Y.) "employment agencies" (held outside the exemption in *Yunker v. Abbye Employment Agency*, 32 N.Y.S. (2d) 715 (Munic. Ct. N.Y. 1942)), "duplicating, addressing, mailing, and mailing list services" (see *Hanzley v. Hooven Letters*, 44 N.Y.S. (2d) 398 (City Ct. N.Y. 1943)), etc.

But in the first instance, the Sixth Circuit stands virtually alone in the position taken in the *Lonas* case that the private or industrial character of the service rendered has no bearing on the applicability of the exemption. In contrast we have the position of the Second Circuit, *Fleming v. Arsenal*, 125 F. (2d) 278, discussed *infra*, p. 14, the Third Circuit, *Fleming v. Kirschbaum*, *supra*, discussed *infra*,

p. 13 the Fourth Circuit, *Guess v. Montague, supra,* discussed *infra,* p. 13, the Fifth Circuit, *Walling v. Sondock,* 132 F. (2d) 77, cert. denied 318 U.S. 772, discussed *infra,* p. 19, and the Ninth Circuit, *Consolidated Timber Co. v. Womack,* 132 F. (2d) 101, discussed *infra,* p. 15.

This Court established the principle that *activities which are part of interstate commerce or the production of goods for interstate commerce are outside the exemption* in *McLeod v. Threlkeld,* 319 U.S. 491. In this case the Court denied coverage to a cook engaged by a contractor to provide meals for maintenance-of-way workers on an interstate railroad. At the same time, however, the Court disposed of the service establishment defense by holding (at p. 494) that:

> The contention that the work of the employee is covered by the exemption of 13 (a) (2) * * * seems without significance. If the work is in interstate commerce, the exemption does not apply.

And in *Walling v. Jacksonville Paper Co.,* 317 U.S. 564 this defense was rejected by this Court, at p. 571:

> It is quite clear that the exemption in Section 13 (a) (2) was added to eliminate those retailers located near state lines and making some interstate sales.

Although the foregoing authorities relate directly to the word "retail" in the exemption section, no significant difference should attach as there is little doubt that Congress included the word "service" because of the fact that many enterprises catering to the consuming public sell a service, rather than a tangible commodity. A barber shop and a butcher shop may exist side by side in Texarkana. Both may have the same essential character of serving the consuming public, although one sells a commodity at retail

and the other a service at retail. The fact that geographical location predisposes some interstate transactions raised a question in Congressional thought which was resolved by adding Section 13 (a) (2) to the Act. But Congress did not intend to exclude services that are rendered to industrial establishments and which form part of an industrial pattern, as is true in the case at bar. A similar question arose in the Fourth Circuit in *Guess v. Montague*, 140 F. (2d) 500, where the exemption was claimed for a machinery repair shop in which machinery was repaired for customers, repair parts and rebuilt and second-hand machinery was sold. The machinery involved was used in manufacturing. In this case the court held:

> On the principle *noscitur a sociis* the service establishment contemplated by the exemption must be the same sort as a retail establishment * * * that is, it must be one selling services to consumers. The exemption does not extend to manufacturing or processing goods for sale, or to production within the meaning of Sec. 3 (j).

And the Third Circuit also ruled squarely on this point in *Kirschbaum v. Walling*, 124 F. (2d) 567 where the facts were even closer to those at bar. In that case an Administrator's suit was brought to enjoin violations of the Act by a loft building which was tenanted by producers of goods for commerce. The employees in question included porters, elevator operators, and other maintenance workers. There it was held that:

> * * * By "service establishments" Congress intended that type of establishment which has the ordinary characteristics of a retail establishment except that it sells services instead of goods.

Respondent would have the Court view its activities in a vacuum, in disregard of the relationship to the factories

it serves. It is not respondent's normal function to cater to personal needs, for windows in private homes are almost invariably washed by members of the household or domestic servants. And it is admitted that respondent's chief function is to serve industrial establishments wherein goods are produced for commerce.

Thus the real question in this case is whether occupations which are "necessary to the production" are to be excluded from the Act because of the capricious circumstances that the operation is farmed out to a contractor who says "I do not produce; I have nothing to sell but a service." If window cleaning is the sort of service contemplated by the exemption, what is there to prevent a factory from contracting out its floor sweeping, the operation of its elevators, its electrical maintenance, and a variety of other operations, with the result that coverage under the Act will no longer depend on the character of the employee's activities, as Congress intended, and this Court has repeatedly held? *Kirschbaum v. Walling, supra, Warren Bradshaw Drilling Co. v. Hall,* 317 U.S. 88, *Overstreet v. North Shore RR.*, 318 U.S. 125.

As the Second Circuit analyzed this point in *Fleming v. Arsenal Bldg. Corp.*, 125 F. (2d) 278 at 280, affirmed by this Court *sub nom. Kirschbaum v. Walling, supra,*

> Nor do we think that the defendant is a "service establishment the greater part of whose * * * servicing is in intrastate commerce"; Sec. 13 (a) (2). Possibly it is not a "service establishment" at all. Perhaps the phrase should be limited to those who serve consumers directly, like tailors, garages, or laundries; the juxtaposition of retail selling and "servicing" does indeed suggest as much. But it is enough for our purposes that, if it is a "service establishment" at least its exemption must depend upon the extent to which its servicing is intrastate.

> Suppose, for example, that these manufacturers, instead of pressing the clothes themselves, sent them out to other shops which pressed only for them; the fact that the pressing took place in the same state as the cutting and stitching would not, we think, exempt the pressers; their servicing would be "in interstate commerce." The "servicing" being a part of "production" the test should be what kind of production it is a part of. The question is really the same as that we have just considered: i. e. whether it is important how that production is divided among employers. It cannot be that if the exemption extends beyond retail "servicing," it is the character of the "servicing" itself that counts, divorced from the "production" of which it is a part. Again, we are met by the anomaly arising from such an interpretation—the capricious incident of the act resulting from the accident of the industrial division of the whole process.

Also in support of our contention is the language of the Ninth Circuit in *Consolidated Timber Co. v. Womack*, 132 F. (2d) 101 at 107:

> * * * It here occurs to us that perhaps it may not truthfully be said that the greater part of the servicing of either cookhouse was in interstate commerce. Was not the greater number of diners at the cookhouses engaged in the production of goods for commerce? Were not the cookhouses an integral part of an organization devoted to the production of goods for commerce? Does it not follow, reasonably and logically, that the greater part of the service rendered by the cookhouses was in interstate commerce rather than intrastate?

Petitioners' position herein finds further support in the decision of the Fourth Circuit in *Walling v. Roland Electrical Company*, 146 F. (2d) 745 and of the Sixth Circuit in *Boutell v. Walling*, 148 F. (2d) 329, both of which are pend-

ing on certiorari this Term. In both cases the employees were held to be covered by the Act, and in both cases the defense of Section 13 (a) (2) was rejected by the respective courts. Yet the material facts in both cases are essentially the same as those at bar. In the *Roland* case the the employer's business consisted of repairing, rebuilding, and reconditioning of motors, and in the installation, relocation, extension and repair of electrical wiring used in the production of goods for commerce. In the *Boutell* case the employer was in the business of servicing motor transportation equipment owned and operated by a corporation which used the equipment in interstate commerce. The Sixth Circuit rejected the service establishment defense, holding "We think the mechanics who service the vehicles which operate in interstate commerce are clearly part of it."

The court held in the *Roland* case (1) that the employees were engaged in the production of goods for commerce within the meaning of the Act; (2) that the employer was not a service establishment since "the labor of its employees was performed almost altogether in rendering services to commercial and industrial concerns, where the cost of the service would not be absorbed by the one to whom they were rendered but would be passed on as part of the price of the product; (3) finally, the court held that since the service was rendered to commercial and industrial concerns, "even if the company could be held to be a service establishment within the meaning of this exemption, the greater part of the servicing was not in intrastate commerce, but in the production of goods for interstate, and the exemption did not apply to it for that reason."

The *Roland*, the *Boutell*, and the instant case are marked by common denominators on the relevant data on which coverage turn. In all three cases the employees in question are separated from the purely physical aspects of production by the fact that their employers are independent contractors who produce no visible, tangible product that enters the channels of commerce. In all three cases the occupations in which the employees engage are necessary to the production of their employers' customers. In all three cases the services rendered are industrial, rather than personal in character. Clearly, the the three cases are indistinguishable and if, as we believe, the *Roland* and *Boutell* cases were correctly decided, there was error in the dismissal of the case at bar.

2. ***Even if respondent is a "service" establishment, it is not within the scope of Section 13 (a) (2) because "the greater part of its * * * servicing is [not] in intrastate commerce."***

Not all service establishments are exempted from the Act, but only those "the greater part of whose * * * servicing is in intrastate commerce." Manifestly therefore Congress contemplated two kinds of servicing: that which is in commerce, and that which is not. If the view urged by respondent is correct then it might be said that there is no such thing as "servicing in commerce" and that the modifying language in the exemption section is without meaning.

The district court held that in order for respondent to lose the exemption, it would have to send its employees out of the state to do their work, a position that disregards

petitioners' necessary relationship to production and which narrows[3] the scope of the Act.

Attention is again directed to the stipulated facts that:

> B. * * * the greater portion of the work done by [respondent] and by [petitioners] under direction of [respondent] was for customers who were engaged in the production of goods for interstate commerce and most of whose employees were engaged in the production of goods for interstate commerce or in occupations necessary to the production of goods for interstate commerce.
>
> C. * * * the foregoing is true both as to the volume of work done by [respondent] in terms of money paid to [respondent] by its customers and as to the number of customers engaged in interstate commerce or in the production of goods for interstate commerce as against those customers of [respondent] not so engaged. (R. 16-17).

It thus follows that even if respondent is a service establishment, it fails to meet the second test, namely, that the greater portion of its servicing be in intrastate commerce.

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[3] It is well established that the Fair Labor Standards Act, which is remedial in nature, is to be liberally construed as to coverage whereas exemptions are subject to strict construction. This Court disposed of any doubts herein when it held in *Phillips v. Walling, supra*, that "The * * * Act was designed 'to extend the frontiers of social progress' by 'insuring to all our able bodied working men and women a fair day's pay for a fair day's work' *Message of the President to Congress, May* 24, 1934. Any exemption from such humanitarian and remedial legislation must therefore be narrowly construed, giving due regard to the statutory language and intent of Congress. To extend an exemption to other than those plainly and unmistakably within its terms and spirit is to abuse the interpretative process and to frustrate the announced will of the people." In *Bowie v. Gonzales*, 117 F. (2d) 11 (CCA 1) the court held that the Act being remedial, all employers who claim exemptions "must bring themselves within both the letter and the spirit of the exemptions since they are subject to strict construction." And in *Fleming v. Hawkeye Pearl Button Co.*, 113 F. (2d) 52, it was held "Sec. 13 (a) (2) creates an exemption to the general scope of the Act and hence is subject to strict construction. In *U. S. v. Dickson*, 10 L. Ed. 689, it is said, 'In short, a proviso carves special exemptions only out of the enacting clause; and those who set up any exemptions must establish it as being within the words as well as the reason thereof.'" See also *Piedmont & Northern Ry. v. Interstate Commerce Commission*, 286 U. S. 289, 311, 312; *Fleming v. Palmer*, 123 F. (2d) 749 (CCA 1).

By respondent's own admission, most of its work is rendered to its manufacturing customers, who engage respondent because they regard its services as necessary to their respective production operations.

It is well established that the service establishment exemption does not apply where an outside contractor undertakes to furnish employees who render a service in establishments engaged in the production of goods for commerce.

In *Walling v. Sondock*,[4] 132 F. (2d) 77 (CCA 5), cert. denied 318 U.S. 772, the facts were almost identical to those at bar. There the employer engaged in the business of furnishing guards or watchmen to various customers in and around Houston, Texas. The customers were engaged in production of goods for commerce. The employer claimed, as does respondent, that the exemption should apply since he was an outside contractor, his business was nominally intrastate, neither he nor any of his employees left the state of Texas, and none of the employees was engaged in actually handling goods in any way. And the Circuit Court held:

> Based on the authority of *Kirschbaum v. Walling supra*, and by analogous reasoning, we hold that these employees are not engaged in a service establishment within the meaning of Section 13 (a) (2),

[4] See also *Walling v. Wattam* (WD Tenn., Oct. 15, 1943) 6 Wage Hour Reporter 1119, *Hanson v. Lagerstrom*, 133 F. (2d) 120 (CCA 8), *Consolidated Timber Co. v. Womack, supra, Haley v. Central Watch Co.* (ND Ill. Jan. 26, 1944), 7 Wage Hour Reporter 144, *Walling v. New Orleans Private Patrol Service*, 57 F. Supp. 143. In the *Haley* case, the court held that "I do not believe that the business of furnishing employees to others is a servicing business."

3. Respondent's employees are not within the scope of the exemption for the further reason that they are not "engaged in" any establishment devoted to a service business.

By its very terms the exemption section has no application to persons *employed by* service establishments. On the contrary, the section provides:

> The provisions of Sections 6 and 7 shall not apply with respect to * * * (2) any employee *ENGAGED IN* any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce. * * * (emphasis supplied).

As we have shown (see footnote 3, p. 18, *supra*) the exemption is to be strictly construed, and such interpretation is to be given as to minimize the excluded area. This Court has already defined the word "establishment" as it is used in the exemption. In *Phillips v. Walling, supra,* it was held:

> Petitioners claim that its retail stores, warehouse, and central office together constitute a "retail establishment" within the meaning of the exemption. The lack of merit in this claim is obvious. * * * If, as we believe, Congress used the word "establishment" as it is normally used in business and in government, as meaning a distinct, physical place of business, petitioner's enterprise is composed of 49 retail establishments and a single wholesale establishment. * * *

And the Sixth Circuit held in *Fletcher v. Grinnell Bros.*, 150 F. (2d)——on July 9, 1945 that the term "establishment" as used in Section 13 (a) (2) of the Act means a single, distinct place of business and in the case of a chain store does not mean the organization as a whole.

Obviously petitioners are not engaged in respondent's establishment. Factory windows cannot be "sent to the laundry." Respondent's entire *modus operandi* is to assign

petitioners to various factories to do their work. Indeed, it is very common for petitioners not even to appear at respondent's establishment at all, except to pick up their paychecks.

In other words, if it is assumed that respondent is indeed a "service establishment," petitioners are employed by it, but *engaged elsewhere.* They are engaged in the factories which are under contract with respondent, and it can hardly be said that these manufacturing plants, in which petitioners are engaged, are service establishments.

When considerations of administrative practicality are taken into account, in terms of legislative resolution to enact a law that could not easily be circumvented, rhyme and reason enures to the meticulous choice of words exercised by the Congressional committees that fashioned the Act. Petitioners submit that the phrase "engaged in" was deliberately chosen in preference to "employed by" in order that the exemption section should also reflect the criterion of coverage implicit in the entire Act, namely the character of the employee's activities.

Thus it is settled beyond cavil that were petitioners employed directly by respondent's customers, they would be covered by the Act, *Walton v. Southern Package Corp.*, 320 U.S. 540, *Armour & Co. v. Wontock*, 323 U.S. 126. For respondents to prevail here would open the door to the possibility of widespread evasions of the Act by use of the independent contractor device. But it is submitted that Congress had this very danger in contemplation when it resolved to limit the scope of the exemption to employees *engaged in* service establishments, thereby anchoring coverage to the broad area of production, independently of the nature of the employer's business, in order that no manipulation of employer entities could serve to defeat the Act.

II.

PETITIONERS ARE ENGAGED IN A "PROCESS OR OCCUPATION NECESSARY TO THE PRODUCTION" OF GOODS FOR COMMERCE WITHIN THE MEANING OF THE ACT.

The Court will take judicial notice of the importance of clean windows in industrial establishments and its effect on the quantity and quality of production. And it would in any event be anomalous indeed for respondent to contend that the enterprise in which it has engaged successfully for many years is "unnecessary" and that respondent and a dozen similar concerns engaged in identical work in Detroit, whose gross receipts aggregate many millions of dollars annually, and who deal almost exclusively with thrifty and pragmatic industrialists, are engaged in a business which is, perhaps, a mere frill that may easily be dispensed with. As this Court held in *Armour & Co. v. Wontock, supra*, at p. 130,

> A court could not readily assume that a corporamanagement was spending stockholders' money on a mere hobby or an extravagance.

And there is ample authority for the contention that respondent's customers were well advised in keeping their windows clean. An editorial in the March, 1942 issue of *Factory Management and Maintenance* entitled "Lighting Takes on New Significance" (Vol. 100, No. 3, p. 101) states:

> * * * Good lighting will increase the quality of production. Machine setting, instrument reading, inspection, typify jobs that will be done better.
>
> Good lighting will increase the effective hours spent on the job. Elimination of eye strain and eye fatigue will reduce both absenteeism and low production work, and more hours will be worked because of fewer lost-time accidents.

> Good lighting will increase morale. Good lighting and good cheer go together. Satisfied workers spend more time on the job and turn out more production than do dissatisfied ones.
>
> Good lighting will increase the effectiveness of supervision. Industry's foremen, of which there are all too few, will be able to see more of their operators and machines at one time, and will be able to supervise more workers.

The importance of windows to lighting is shown in an editorial in *Architectural Forum* for May, 1941, (Vol. 74, pp. 333 and 335) which states in part that:

> Properly controlled sunlight and light from the sky are still the standard of lighting quality and color and diffuse daylight the ideal light source.

Also in *National Safety News*, organ of the National Safety Council, Inc., March, 1940 issue (Vol. 41, No. 3, p. 88) we find:

> Adequate daylight, properly applied, is the ideal light. * * *
>
> *Windows and skylights soon become covered with dirt and dust and the natural light is often decreased below the level needed for safety and efficiency. Thus, regular window cleaning should be part of the routine of every establishment.* (Emphasis supplied.)

That window cleaning is necessary from the standpoints of cleanliness and morale is well recognized. And it would seem self evident that the necessity goes far deeper, relating to the very kernel of efficient factory management and maintenance. Any need for speculation herein was erased,

however, when a scientific and specialized study[5] was made by a group of experts, two from industry and the third on the faculty of a university. The conclusions thus reached and reported to the convention of the Illuminating Engineering Society, are highly significant to the questions at bar. The report reads, in part (pp. 239-240):

> * * * The amount of light transmitted through glass decreases with the amount of dirt deposited on the glass and this amount of dirt increases with the time of exposure to dirt laden atmosphere. * * * The actual decrease in transmission of light through glass for various lengths of time * * * as well as information regarding the dirt collecting proclivities of various types of industrial glass is important information in predicting natural illumination. On that account the data presented in this paper were obtained for and by the Department of Engineering Research of the Detroit Steel Products Company and the Department of Engineering Research of the University of Michigan, Professor H. H. Higbie directing this phase of the investigation for the University.
>
> Tests were made at intervals, from clean, of 14, 15, 42, 72, 85, and 121 days. The values of transmission factor for similar glass at the same slope were averaged (292 determinations of transmission coefficient for 52 samples of glass * * * were recorded), the values being those shown in Table 1[6]. In order to determine, for all types of glass, the effect of time and slope, we can average these values.

---

[5] "Making Your Windows Deliver More Daylight," a paper presented before the 20th Anniversary Convention of the Illuminating Engineering Society, Spring Lake, N. J., Sept. 7-10, 1926, by W. C. Randall, chief engineer, Detroit Steel Products Co., Detroit, Mich., and Allen J. Martin, illuminating engineer, Engineering Research Department, Detroit Steel Products Company, and appearing on pp. 239-257, Vol. 22, 1927, Transactions of the Illuminating Engineering Society. Professor H. H. Higbie of the Department of Engineering Research of the University of Michigan, directed the investigation.

[6] See Appendix II, p. 37.

Decrease in Light Transmissions

In Fig. 1[7] we have presented graphically the values in Table II in order to show the gradual decrease, for the glass on several slopes of transmission coefficient as the exposure to dirt is continued.

This study, which is authoritative in its field, shows graphically and scientifically the fact that respondent's enterprise has a necessary role to play in industrial Detroit and that its work is necessary to the production for commerce that takes place in the light of windows which petitioneers clean.

Petitioners have been unable to find any scientific study of the subject or textbook in the field of factory maintenance that denies the need for adequate illumination and the essential wisdom of taking full advantage of natural lighting. On the other hand, many authorities stress the need for adequate lighting. Thus,

> Modern management has recognized that effective illumination of the workplace is one of its most productive investments. The modern factory building is designed to make maximum use of natural illumination. There is little question but that defective lighting increases waste, places an unnecessary strain upon employees, and tends to decrease productivity. *Richard H. Lansburgh and William R. Spriegel, Ph. D., in Industrial Management*, page 163[8].

The foregoing authors go on to state in the text that industrial accidents are increased by improper lighting. It is pointed out by C. Canby Balderston, Victor S. Karbosz,

---

[7] See Appendix III, p. 37.

[8] John Wiley & Sons, Inc., N. Y., 1940.

and Robert P. Brecht, all of the faculty of the University of Pennsylvania, in Management of an Enterprise, p. 145[9], that

> * * * the necessity of keeping windows clean is * * * all important for natural lighting.

The need for clean factory windows goes far deeper than the superficial reason of mere appearance, as we are told by *Industrial Engineering* in an article entitled "*Clean Windows: Most Daylight:*"[10]

> Outside the plant daylight costs nothing; to get it inside the plant costs money—for windows and the expense of keeping them clean. If for any reason sufficient daylight does not come in to the plant, electric energy must be consumed to make up the difference between the amount of light available and the amount required. Hence there are plenty of reasons aside from the standpoint of appearance for keeping factory windows clean.

And in an article entitled "*Clean Windows for Safety*" by E. W. Canover[11] in *Safety Engineering*:[12]

> For several years we have emphasized the improvement in illumination to be gained by keeping windows clean. * * * Dirt, more than any other thing, can nullify the finest lighting installation and make very inefficient the most expensive and modern lighting device. Whether the lighting is by natural or artificial means, accumulation of dirt on the glass of the light source robs the building of light that has been paid for. * * * From our findings relative to the location of the dirt, we can make the recommendation that windows be washed more frequently from the inside. Since windows are installed for

[9] Prentice-Hall, Inc., N. Y. 1937.
[10] Vol. 89, No. 3, March, 1931.
[11] Research Engineer, Detroit Steel Products Company.
[12] Vol. 74, No. 3, September, 1937, pp. 13-14.

> the purpose of admitting natural light, it is consistent that provision should be made to keep them relatively clean, and maintain a reasonable schedule of washing.

And an article in *The Foundry* entitled "*Dirt on Windows Causes Loss of Daylight*,"[13] points out that window washing results in

> * * * an increase in speed and accuracy of vision and a decrease in fatigue. * * * the proper use of daylight in place of electricity would mean a decided reduction in overhead.

The conception that light and cleanliness are necessary to the production of goods for interstate commerce is by no means new to this Court, which affirmed the Second Circuit in its holding that maintenance workers who render a factory building clean and habitable are within the Act even though they are employed by the building rather than by the producers of goods for commerce who occupy the building. The Second Circuit thus held in *Arsenal Bldg. Corp. v. Walling*, 125 F. (2d) 278:

> Cutters and stitchers cannot work in cold and *filthy* buildings. They must have *light* and power to drive their machines. * * * *Those who make and keep a factory fit for them in these ways are as necessary to production as they are themselves. It would defeat the purposes of the Act to deprive these workers of its protection when they chance to be employed by a different employer as the cutters and stitchers.* (Emphasis supplied.) Affirmed, 316 U.S. 517.

It is submitted that no distinction can be drawn between *Arsenal* employees whose function it was to provide cleanliness and artificial lighting, and petitioners who simul-

[13] Vol. 63, P. 89, August, 1935.

taneously provide clean windows and preserve natural lighting. By any criterion petitioners are engaged in an "occupation necessary to the production" of goods for commerce "in any state."

In the courts below respondent placed great reliance on the fact that petitioners do not actually handle goods in process of production. But this Court has made it abundantly clear the word "production" is not to be so narrowly construed. In *Borden v. Borella*, 65 S. Ct. 1223, coverage was affirmed as to porters, night watchmen, and elevator operators who were employed in a 24 story building owned and operated by the Borden Company and used as office quarters for its advertising, administrative, and kindred departments. And this Court said:

> The only distinction between this case and the *Kirschbaum* case lies in the fact that here the employees work in a building where production of goods is administered, managed, and controlled, rather than carried on physically. We hold, however, that this distinction is without economic or statutory significance and that it cannot form the basis for concluding that respondent employees are engaged in occupations unnecessary to the production of goods for commerce.
>
> In an economic sense, production includes all activity directed to increasing the number of scarce economic goods. It is not simply the manual, physical labor involved * * *.

It is submitted that no distinction can be drawn between petitioners and the porters in the *Borden* case. On the other hand a significant distinction is to be found as between petitioners and the employees involved in 10 *East 40th St. Bldg. Inc. v. Callus*, 65 S. Ct. 1227. As the Court said,

> Running an office building as an entirely independent enterprise is too many steps removed from the physical process of the production of goods. * * * To assign the maintenance men of such an office building to the productive process because some portion of the offices in the building may, for the time being, be offices of manufacturing enterprises, is to indulge in an analysis too attenuated for appropriate regard to the regulatory powers of the states which Congress say fit to reserve to them. * * *
>
> But an office building exclusively devoted to the purpose of housing all the usual miscellany of offices has many differences in the practical affairs of life from a manufacturing building or an office building of a manufacturer.

Thus the business of the *10 East 40th St. Bldg.* was the running of a local building. A single and separate entity, anchored with its 48 stories to the bedrock of Manhattan, *its employes at no tme left the building to do their work.* It mattered not at all by whom it was tenanted. Respondent, in contrast, sends petitioners into Detroit's huge manufacturing plants. The building at 10 E. 40th Street is its own excuse for being. Respondent, on the other hand, is part and parcel of Detroit's automobile industry. Deprive respondent of its factory accounts, and it would shrivel immediately into a very small, inconsequential enterprise. It may be said that exclusion of the *10 East 40th Street* employees carves nothing out of the production process, for in that case no independent contractor was interposed between the production and workers whose work is "necessary to the production." In the case at bar, however, both petitioners and respondent, far from being a "purely local business" are part of the life stream of the automobile manufacturing industry. A single building, which rents space to all and sundry, is a distinct, physical, and tangible entity. Unless, as in the case of the *Borden*

building, it is wholly owned by a manufacturer or is occupied by manufacturers, it develops its own character, and its business is itself. But on the principle *noscitur a sociis* respondent at bar is too deeply enmeshed in the producton of its customers to claim truthfully that it stands alone.

One more distinction between *10 E. 40th Street* and respondent merits consideration. In the former, the narrowing of coverage ends with the building itself. But in the case at bar, where is the process to end? What is there to prevent a "purely local concern" in Detroit from engaging in the business of operating elevators, assigning its employees to work inside the automobile manufacturing plants where their sole duty may consist of operating the elevators, and then paying these employees wages lower than those required by the Act, working them any number of hours without overtime payment, and finally evading the scope of the Act because the business of the company is merely to run elevators? If respondent prevails here on the theory of the *10 E. 40th Street* case, where is the line to be drawn?

As the trial court held in the *Kirschbaum* case,

> I do not think Congress transgressed Constitutional limitations in undertaking to deal with certain marginal activities so closely related with production that without regulating them there cannot be a plenary exercise of that power. This relationship is expressed in the phrase "necessary to the production." *Walling v. Kirschbaum*, 38 F. Supp. 204.

Here the court touched on the *sine qua non* of administrative practicality contemplated by Congress. For as we have already said, it can hardly be disputed that petitioners would be within the Act if employed directly by the several factories whose windows they clean. And as the court held in *Lorenzetti v. American Trust Co.*, 45 F. Supp. 128,

reversed on other grounds 137 F. (2d) 742, "Congress could not have intended to exempt a business which contracts to furnish labor to establishments engaged in interstate commerce" since then the Act "could be evaded by the interposition of an independent contractor between the laborer and the interstate business receiving the benefit of his services." Although employment by independent contractors may be legal and at times necessary, the Act is geared to economic function. An employee's rights under the Act may not therefore be made to depend upon the fortuity of his being employed by a contractor, rather than by a manufacturer to whose productive operations he is necessary.

III.

THE COMPLAINT WAS IMPROPERLY DISMISSED ON THE DISTRICT COURT'S OWN MOTION SINCE NO PROOFS HAD BEEN TAKEN

Judgment was entered in the district court on the court's own motion dismissing the complaint (R. 21-22). No proof's were taken on petitioners' contention that they are engaged in a "process or occupation necessary to the producton" of goods for commerce.

Had petitioners not thus been denied the opportunity to present proofs, they would have established the close and intimate tie between window cleaning and the production that takes place within the factories whose windows are cleaned. It would have been shown that a vast business enterprise is here involved whose implications are direct to the intricate interstate network of the automobile manufacturing industry. The proofs would have shown that petitioners hardly ever see respondent's establishment; that they work in the factories with which respondent is under contract. That during the war petitioners were

required to comply with the identical requirements of citizenship as those employed directly by the factories in order to gain entrance into the factories to do their work.

It would have been shown by expert testimony that 75% of the dirt on factory windows is on the inner surface of the glass, so that petitioners must perforce work in the factories, as well as outside. It would have been proved that the failure to wash factory windows results, after a short time, in depreciation to less than one-half the windows' light transmission capacity determined when they are clean. A direct and immediate relationship would have been established betwen window cleaning and efficiency of production. Competent experts on industrial safety would have testified that poor lighting predisposes an industrial plant to an increased accident rate. Moreover it would have been shown that filthy windows detract from employee morale and are thus reflected in decreased production.

It would have been proved that the failure to wash windows means, if adequate illumination is to be maintained, a substantially increased reliance on artificial lighting, which adds to the production cost of the product.

The proofs would have shown that respondent's customers have never absorbed the cost of window cleaning, but have always passed the cost on as part of its cost of production. Moreover that respondent's customers have always deducted the cost of window cleaning from their respective gross incomes for income tax purposes as "ordinary and necessary expenses" under Section 23 (a) of the Internal Revenue Code, and that if respondent had not undertaken to do the work, and if no other outside contractor had been engaged to do it, the factories would have arranged to do it themselves—but that in no event would this necessary work have been left undone.

It is respectfully submitted that if petitioners had been permitted to present evidence on all of the foregoing, the Sixth Circuit would not have found "it impossible to entertain the concept that window cleaning becomes interstate commerce, or is in the pursuance of the production of goods for commerce, by the fact that the windows cleansed are in the manufacturing establishments of industries engaged in interstate commerce."

For all of these reasons it is submitted that there was error in the dismissal of the complaint on the district court's own motion. Petitioners submit that the stipulated facts are sufficient fully to warrant reversal of the judgment below with directions to enter judgment for petitioners. In no event, however, should the complaint have been dismissed without petitioners having been accorded an opportunity to take testimony.

CONCLUSION

It is therefore submitted that:

1. Petitioners are not engaged in a service establishment within the exemption provided by Section 13 (a) (2) because industrial services were not contemplated by the exemption section.

2. Even if it could be said that respondent is a service establishment, it is nevertheless without the exemption because the greater part of its "servicing" is admittedly not in intrastate commerce.

3. Petitioners are outside the exemption for the further reason that they are not "engaged in" any establishment devoted to a service business.

4. Petitioners are engaged in a "process or occupation necessary to the production" of goods for commerce within the meaning of the Act.

5. The complaint was improperly dismissed on the district court's own motion, since no proofs had been taken.

For these reasons the judgment below should be reversed.

Respectfully submitted.

LEON A. COUSENS,
Attorney for Petitioners.

DANIEL D. CARMELL,
Of Counsel.

APPENDIX 1

STATUTE INVOLVED

The following are pertinent provisions of the Fair Labor Standards Act of 1938, 52 Stat. 1060, 29 U.S.C., Sec. 201 et seq.:

Sec. 3. As used in this Act—

* * *

(j) "Produced" means produced, manufactured, mined, handled, or in any manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof, in any State.

Sec. 7 (a) No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—

(1) for a workweek longer than forty-four hours during the first year from the effective date of this section,

(2) for a workweek longer than forty-two hours during the second year from such date, or

(3) for a workweek longer than forty hours after the expiration of the second year from such date,

unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

Sec. 13 (a)—The provisions of sections 6 and 7 shall not apply with respect to * * * (2) any employee engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce; * * *

Sec. 16 * * *

(b) Any employer who violates the provisions of section 6 or section 7 of this Act shall be liable to the employee or employees affected in the amount of their unpaid minimum wages or their unpaid overtime compensation, as the case may be, and an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated, or such employee or employees may designate an agent or representative to maintain such action for and in behalf of all employees similarly situated. The court in such action shall, in addition to any judgment awarded to the plaintiff or plantiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action.

APPENDIX II

PERCENTAGE-WISE DEPRECIATION OF DAYLIGHT THROUGH WINDOWS, BASED ON TIME INTERVALS AFTER WASHING

(After Randall, Martin & Higbie, see p. 24)

TYPE OF GLASS	DEGREES SLOPE FROM VERTICAL							DAYS SINCE CLEAN
	0°	15°	30°	45°	60°	75°	90°	
1/8" CLEAR	0.820	0.840	0.904	0.836	0.790	0.824	0.861	0
1/8" FROSTED	0.762	0.704	0.807	0.760	0.831	0.788	0.650	
1/8" V. R. GREEN	0.880	0.846	0.816	0.812	0.728	0.699	0.643	
1/8" ROUGH OR CHANNELED	0.871	0.807	0.770	0.785	0.722	0.746	0.810	
1/8" CLEAR	0.829	0.640	0.584	0.553	0.535	0.438	0.495	14
1/8" H. R.	0.780	0.627	0.662	0.520	0.474	0.528	0.408	
1/8" V. R.	0.730	0.669	0.574	0.473	0.483	0.441	0.400	
1/8" R OR H	0.700	0.545	0.572	0.510	0.446	0.531	0.396	
1/4" CLEAR	0.790	0.77[illegible]	[illegible]89	0.604	0.565	0.565	0.573	15
1/4" H. R.	0.665	0.665	0.[illegible]0	0.588	0.503	0.508	0.544	
1/4" V. R.	0.745	0.750	0.[illegible]5	0.629	0.524	0.483	0.544	
1/4" R OR H.	0.805	0.767	0.556	0.710	0.517	0.556	0.625	
1/8" CLEAR	0.651	0.569	0.528	0.449	0.427	0.367	0.364	42
1/8" H. R.	0.676	0.566	0.431	0.429	0.445	0.370	0.347	
1/8" V. R.	0.716	0.464	0.424	0.400	0.416	0.335	0.292	
1/8" R OR H.	0.673	0.433	0.467	0.469	0.484	0.382	0.370	
1/8" CLEAR	0.581	0.701	0.441	0.394	0.318	0.368	0.389	72
1/8" H. R.	0.517	0.630	0.345	0.310	0.299	0.259	0.312	
1/8" V. R.	0.554	0.498	0.380	0.358	0.330	0.316	0.270	
1/8" R OR H.	0.571	0.531	0.410	0.361	0.355	0.296	0.322	
1/8" CLEAR	0.556	0.412	0.378	0.274	0.283	0.258	0.236	86
1/8" H. R.	0.506	0.425	0.353	0.316	0.278	0.278	0.229	
1/8" V. R.	0.513	0.406	0.362	0.260	0.285	0.257	0.232	
1/4" R OR H.	0.589	0.426	0.384	0.320	0.287	0.256	0.266	
1/8" CLEAR	0.435	0.316	0.332	0.244	0.264	0.217	0.270	121
1/8" H. R.	0.418	0.264	0.281	0.246	0.244	0.247	0.254	
1/8" V. R.	0.428	0.269	0.261	0.254	0.240	0.246	0.264	
1/8" R OR H.	0.482	0.270	0.266	0.252	0.238	0.240	0.251	

TABLE I - EXPERIMENTALLY DETERMINED TRANSMISSION FACTORS.

APPENDIX III

(After Randall, Martin & Higbie, see p. 24)

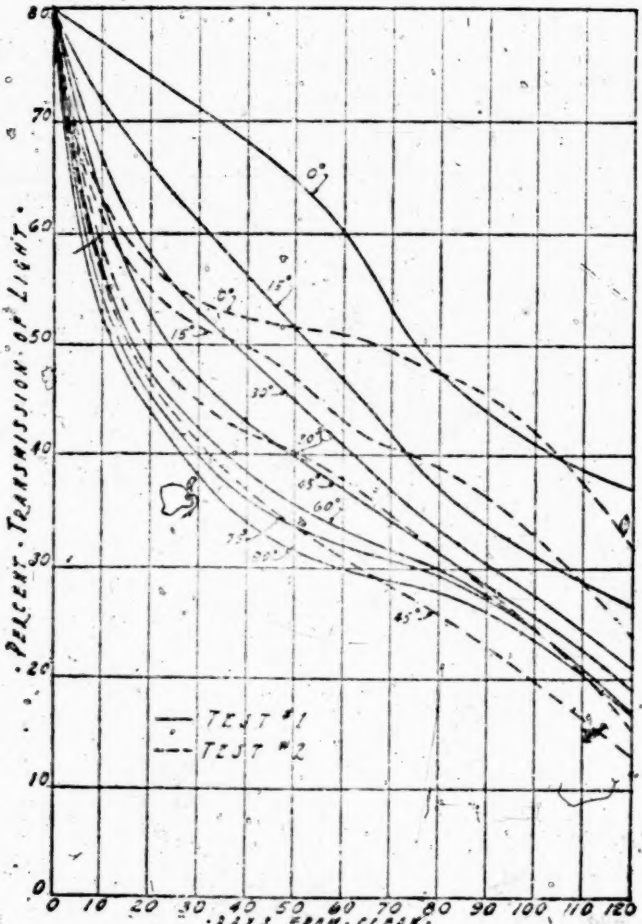

FIG. I — VARIATION OF TRANSMISSION FACTOR WITH TIME - TWO METHODS OF MEASUREMENT

OCT 8 1945
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CLERK

No. 21

Supreme Court of the United States

OCTOBER TERM, 1945

THOMAS MARTINO,
PETITIONER,

v.

MICHIGAN WINDOW CLEANING COMPANY,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITIONERS' REPLY BRIEF

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Petitioners Would Be Within the Act If Employed Directly By the Factories Whose Windows They wash

The purposes of the Fair Labor Standards Act cannot be evaded by the device of contracting out to a separate corporation work which otherwise would be under the terms of the Act. Clearly, General Motors Corporation would be within the Act if it had employed these window washers directly, and the accomplishing of the same result by employing the respondent, Michigan Window Cleaning Company, does not deprive the window washers of the protection of the law. To construe the statute otherwise would make possible the destruction of its purpose, for if this were permitted as to an independent contractor it

might be employed to remove more and more employees from the protection of the Act through the use of subordinate corporations.

Kirschbaum v. Walling, 316 U. S. 517, 524, states that ". . . the provisions of the Act expressly make its application dependent upon the character of the employees' activities," and establishes that maintenance employees may be engaged in occupations necessary to the production of goods for commerce within the meaning of the Act even though not employed by the manufacturer of goods. If the window washers in the instant case were employed by respondent's customers to perform the same kind of work which they now do as employees of respondent, there is no question they would be held to be engaged in occupations necessary to the production of goods. As is more fully developed in Petitioners' Brief (pp. 22-31), and emphasized below in this Reply Brief, the work of window washing, by whomsoever performed, is so closely related to the physical process of production that to differentiate between employees of the factory itself and employees furnished by an independent contractor "is to make too much turn on the accident of the division of the whole industrial process." (See 10 *East 40th Street Building v. Callus*, 65 S. Ct. 1227.)

Petitioners Are Engaged In An Occupation "Necessary to the Production" of Goods for Commerce and Do Not Come Within the Exemption Provided by Section 13(a) (2)

The Respondent admits that the question of the "necessity of window washing" to the production of goods for commerce or to commerce itself, is not an issue in this case. Respondent states the only question to be "whether or not the greater portion of respondent's servicing was interstate or intrastate" (Respondent's Brief, p. 24),

and to bolster this contention, the respondent quotes from Interpretative Bulletin No. 6, dated December 1938, and makes the argument that the criterion used in Section 13 (a) (2) is based upon the nature of the business conducted by the employes. On page 9 of its Brief, the respondent states that "with the foregoing citation in mind, it is plain to see that Petitioner is proceeding upon an erroneous theory which is not supported by law or the Interpretative Bulletin." The fallacy of the last statement of the respondent arises from the fact that since 1941, the original Interpretative Bulletin, which was issued soon after the Wage and Hour Law became effective, has been changed in the light of more mature considerations and decisions of the courts, so that Section 5 of the same Interpretative Bulletin No. 6 now reads:

> "It should be noted that the test prescribed in Sections 6 and 7 is related to the nature of employment of the particular employee. The criterion used in section 13 (a) (2), on the other hand, is based upon the nature of the establishment in which the employee is engaged. Thus, under sections 6 and 7, some employees of a given employer may be covered and others may not be covered. If, however, the exemption provided by section 13 (a) (2) is applicable because the greater part of the selling or servicing by the retail or service establishment is in intrastate commerce, all employees engaged in the establishment are exempted from sections 6 and 7."

This Court pointed out in *Phillips v. Walling*, 323 U. S. ....., that "* * * the word 'establishment' [means] a distinct, physical place of business." Accordingly it follows that even if it is assumed for the purposes of argument that respondent is a service establishment, the greater part of whose servicing is in intrastate commerce, the exemption would in this case not be applicable for the further reason that respondent's employees are not engaged *in* respondent's establishment. It is not enough that the em-

ployee be engaged *by* a service establishment—he must be engaged *in* a service establishment.

Numerous cases have held the exemption provided by Section 13 (a) (2) inapplicable to establishments operated substantially for industrial customers. See *Bracey v. Luray*, 138 F. (2d) 8; *Guess v. Montague*, 140 F. (2d) 500; *Walling v. Consumers Co.*, 8 Wage Hour Rept. 350. In *Schmidt v. Peoples Telephone Union*, 138 F. (2d) 13, 15, the Eighth Circuit refused to apply the exemption to a local telephone company, which of course provides "service" in the literal sense, and held that "the term applies to an altogether different class of business, such as restaurants, hotels, laundries, garages, barber shops, beauty parlors, funeral homes, shoe-shining parlors, clothes pressing clubs, and the like."

It is particularly significant in the instant case that respondent in its Brief fails to refute the authorities cited in Petitioner's Brief (p. 22-27), all of which establish the close relationship of window washing to the production of goods. The authoritative sources on factory and production problems, such as the United States Department of Labor,[1] the National Society for the Prevention of Blindness,[2] and other authorities,[3] all place great emphasis upon the need of clean windows for efficiency and safety in production. It is submitted that the conclusion is inescapable that the window washers involved in this case are engaged in an occupation which is essential to the successful operation and maintenance of the manufacturing plants in which they work and is clearly necessary to the production of goods for commerce within the meaning of the Act. Clearly, the activities of the window washers in this case are indistinguishable from the work of the janitors and

[1] See Appendix I.
[2] See Appendix II.
[3] See Appendix III.

porters in the *Kirschbaum* case and in *Borden Co. v. Borella*, 65 S. Ct. 1223.

In its Brief, respondent states (p. 26) that, "Employees of respondent are not sent 'into' manufacturing plants in the sense employed by Petitioner. Employees of respondent wash windows. The windows are in the outside walls of buildings." It was stipulated, however, that the greater portion of the work done by the employees in this case was in washing windows located in factories which produced goods for interstate commerce. The respondent wants this Court to conclude that such a stipulation means that windows are on the "outside walls of buildings." We merely point out that those same walls have two sides, an "inside" and "outside," and that we need not conclude that window washers climb up on the outside of a building to wash windows, where the fact is that they go into plants and wash the inside as well as the outside of the windows.

Respondent's Brief cites many District Court opinions, none of which is relevant to the instant case. A lengthy analysis of each of these lower court citations is not warranted, since the decisions of this Court make it clear that the arguments advanced by respondent are without merit.[4]

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[4] An examination of some of the District Court cases cited by respondent discloses that they are not applicable.

Walling v. Fred Wolferman, Inc. (D.C. Mo. 1944), 54 F. Supp. 917, was erroneously decided. This Court's subsequent decision in *Phillips v. Walling, supra* (see p. 20 of Petitioners' Brief) completely repudiates the broad construction given by the *Wolferman* case to the word "establishment." A reading of the context of the Court's opinion in *Gavril v. Kraft Cheese Co.*, 42 F. Supp. 702, indicates that this decision supports petitioners' position, rather than that of respondent. In the *Gavril* case the employees were held to be engaged in commerce within the meaning of the Act and the exemption in Section 13 (a) (2) was rejected; but the complaint was dismissed because of the applicability of Section 13 (b) (1), a factor wholly foreign to the issues here. Respondent cites the decision of the District Court in *Walling v. Roland Electric Co.*, 54 F. Supp. 733, in support of its position, but fails to disclose the fact that this decision was reversed by the Fourth Circuit, 146 F (2d) 745, and is now pending on certiorari in this Court. *White v. Jacobs Pharmacy*, 47 F. Supp. 298, is also inconsistent with this Court's decision in the *Phillips* case and reveals a misapprehension of the scope of Section 13 (a) (2) into which the court was led because of its reliance on the 1938 edition of Interpretative Bulletin No. 6 which is discussed more fully above.

The Complaint Was Improperly Dismissed

The objection raised by respondent's Brief (p. 27), that Petitioners have introduced the question as to the propriety of the dismissal of the complaint for the first time in this Court is not supported by the record. The record makes it clear (R. 23, points 3 and 4) that the point was raised on October 29, 1943, when petitioners filed their "Statement of Points" in the Circuit Court of Appeals. As the record will also disclose, no motion to dismiss the complaint or motion for summary judgment of dismissal was ever filed by respondent and no proofs had been taken at the time the District Court dismissed the complaint *sua sponte*, after petitioners, at the District Court's direction, had renewed their motion for summary judgment. The language "in accordance with the instructions of the Court" which appears in the Renewal of Motion for Summary Judgment was inserted in the motion for the purpose of indicating that petitioners were acting at the Court's order.

Instead of it being "unfair for petitioners to be permitted to go off into realms of possibilities, conjectures, and suppositions," as respondent (p. 28) characterizes the discussion of the proof which could have been adduced, the Rules of Civil Procedure require that on a motion to dismiss the complaint, all allegations of fact in the complaint be taken as true, in the factual light most favorable to the plaintiff's position. *Mott v. City of Flora et al*, 3 Federal Rules Decisions 232; *Nye et al v. Mutual Benefit Life Ins. Co. et al*, 3 Federal Rules Decisions 308.

Petitioners Are Not Barred from Recovery Under the Act Because They Were Compensated According to the Terms of a Union Contract

The contention of the respondent that the petitioners are estopped because of a private trade union contract has been consistently and unanimously rejected by this Court. Private contracts made before or after the passage of the Wage and Hour Law regulating overtime cannot take the overtime transactions "from the reach of dominant constitutional power" and any contract falling short of the basic policy of the Act cannot be utilized to deprive employees of their statutory rights. See *Overnight Motor Co. v. Missel*, 316 U. S. 572; *Walling v. Youngerman-Reynolds Hardwood Co.*, 65 S. Ct. 1243; *Wilkenson vs. Noland*, 40 F. Supp. 1009.

CONCLUSION

It is therefore again submitted that the judgment below should be reversed and the cause remanded with instructions to enter judgment for the Petitioners.

Respectfully submitted,

LEON A. COUSENS,
Attorney for Petitioners.

DANIEL D. CARMELL,
Of Counsel.

APPENDIX I

ILLUMINATION

By J. S. Rogers

Poor lighting harms eyes and may effect entire body—Uniform light distribution important—General illumination—Local illumination—Natural light—Recommended levels of illumination.

* * *

Work and safety depend upon seeing, but eyes are useless without light. * * * Estimates have been made by those interested in safety which indicate that poor illumination contributes to at least 25 percent of industrial accidents.

Not only is it a well-established fact that poor lighting adversely effects the eye itself, but recent investigations have confirmed a long suspected effect of unsatisfactory lighting conditions upon the general health of the human body. All organs of the body are integrated to form a human working machine, and imperfections in one organ often effect others. Thus, eye fatigue induced by the unnecessary strain resulting from poor lighting does effect the general health of those who are subjected to such a harmful environment.

Regardless of its source, whether it be daylight or artificial light, light obeys the same natural laws. Eyes require light of not less than certain minimum quality uniformly distributed over work areas. * * *

NATURAL ILLUMINATION

Natural illumination through windows and skylights is desirable because of its spectral quality, * * *.

Besides directly reducing accidents and improving production, good factory lighting aids in maintaining a clean and orderly plant. Dirt hidden in corners by shadows is

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Protecting Plant Manpower, Practical Points on Industrial Sanitation and Hygiene, Special Bulletin No. 3, United States Department of Labor, Division of Labor Standards, Government Printing Office, Washington, 1941, pages 63-66.

unnoticed. Scattered material and general unkeptness are not obvious under poor light. Because cleanliness and orderliness are considered by sound management definite factors in the efficient and economical operation of factories, it is important from the operating point of view that good lighting be provided. Cleanliness and orderliness mean good "housekeeping" [which is] an essential element in well organized safety programs.

APPENDIX II

EYE HAZARDS IN INDUSTRY *

By Louis Resnick

Natural lighting—Maintenance.

Clean windows are essential to proper utilization of natural light, and this simple rule of good housekeeping will go far toward solving the lighting problem in many plants. In plants having extensive window space but inadequate window-cleaning service, accumulated dust, grease, and grime on window panes may cut natural illumination to zero, so that it is necessary during practically all hours of the day to resort to artificial light. The cleaning of luminaires and of light bulbs themselves is equally important.

The fact that light is a factor which increases the efficiency and safety of every other tool is fully appreciated by progressive designers and owners of modern plants. It is not uncommon to build track systems for window washers' trucks upon roof and walls of factories so as to facilitate window and skylight working.

An example may be cited which shows the importance placed on clean windows by progressive industries in a steel plant in Pennsylvania. $50,000.00 was spent for construction of a window washer's railway system immediately under the glass roof of the plant * * *.

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* Published by the National Society for the Prevention of Blindness, Columbia University Press, 1941, p. 18-190.

The proper and adequate maintenance of equipment is essential for both natural and artificial lighting. The factory owner should establish a regular definite system of maintenance so as to insure that skylights, side windows * * * are at all times kept clean * * *.

APPENDIX III

PSYCHOLOGY FOR BUSINESS AND INDUSTRY[1]

By Herbert Moore, Ph.D.

The importance of proper lighting can best be shown by giving some facts that have been discovered regarding the effects of poor illumination on both efficiency and accident frequency.

A. Effects on Efficiency. The decrease in efficiency because of inadequate illumination is shown in a study made by the National Industrial Fatigue Research Board. [This study] gives the record of work under two conditions, which differ from one another only in the degree of illumination present. It will be noticed that not only was the output lower in the first hour of the morning when artificial illumination was used, but that it remained lower during every hour of the day, with the exception of one period.

* * * *

Studies made by the Departmental Committee on Lighting of factories and workshops in Great Britain report the percentage increases in accidents attributable to poor artificial lighting . . . The striking fact about these reports is that on docks and in shipyards and metal foundries there were twice as many accidents due to persons falling during artificial as during natural light.

A study made by Stephenson on the effects of artificial light, as compared with natural light, on accident rate showed an average increase of 36 per cent under artificial light. His results showed a significant increase in accident rate during the first hour of each day when artificial light

[1] McGraw-Hill Book Company, Inc., 1942, pages 344-351.

is used; that is succeeded by a period of adaptation with approximately daylight accident rate; and then follows a large increase in rate (140 per cent in his study), due to the more rapidly fatiguing eye condition under artificial light.

* * * * *

Percentage Loss in Reading Efficiency Under Different Systems of Illumination

System of illumination	Per cent loss after	
	Two hours	Three hours
Daylight	5	6
Indirect	10	9
Semi-indirect	34	72
Direct	37	81

Supreme Court of the United States

OCTOBER TERM, 1944

No. 849

THOMAS MARTINO
Petitoner

vs.

MICHIGAN WINDOW CLEANING COMPANY
Respondent

OPPOSING BRIEF OF RESPONDENT IN THE MATTER OF THE PETITION FOR WRIT OF CERTIORARI

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THE INLAND PRESS, DETROIT, MICHIGAN

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Questions Involved

The questions presented by the Petitioner are somewhat at variance with the questions presented in the appeal to the Circuit Court of Appeals. Petitioner attempts to submerge a vital fact concerning the nature of the business of the Respondent and its employees. The questions involved which were answered affirmatively in the Lower Court and in the Circuit Court of Appeals, are as follows:

1. Is a concern, exclusively engaged in washing windows of buildings, which it does not own or control, all of which buildings are located within the State of Michigan, a "service establishment" within the meaning of Sec. 13(a) of the Fair Labor Standards Act of 1938?

2. Since the concern is a "service establishment" within the meaning of the law, does the exemption operate if the concern is engaged exclusively in servicing buildings located only in the State of Michigan?

Supreme Court of the United States

OCTOBER TERM, 1944

THOMAS MARTINO, *Petitioner,* vs. MICHIGAN WINDOW CLEANING COMPANY, *Respondent.*	No. 849

OPPOSING BRIEF OF RESPONDENT IN THE MATTER OF THE PETITION FOR WRIT OF CERTIORARI

Counter-Statement of Facts

Petitioner's counsel's statement that "all the material facts are stipulated" is somewhat misleading, particularly as he follows said statement with the additional words, "on the basis of the following undisputed facts," and then proceeds to make allegations which were not stipulated and attempts to enlarge upon the facts which were stipulated. We are therefore constrained to call attention to the inaccuracies in Petitioner's Statement.

Respondent owns and operates a window cleaning business. It is not a "large" business. It employs about twenty men. The window cleaners in the employ of the Respondent wash windows in all types of buildings, but certainly that can not be called "keeping the factory clean to that event."

There is no stipulation covering the statement of counsel

for Petitioner concerning the possible or likely effect of window cleaning. Neither was it stipulated what the petitioner would have proved if the District Court had not dismissed the complaint.

There is no stipulation "which showed that more than a substantial part of the work done by petitioners was on buildings in which goods were produced for interstate commerce." The stipulation of facts (R. 10) states:

> "That the parties plaintiff were employed as window washers and cleaners by defendant corporation, and were assigned by the defendant to the cleaning of windows on various buildings whose occupants were under contract with the defendant corporation for the performance of such window washing."
>
> "That among such occupants were companies definitely engaged in the production of goods in interstate commerce, such as various units of the General Motors Corporation."

The quotation from the opinion of the Honorable Frank A. Picard, District Judge, on page 4 of Petitioner's Petition filed in this Court, removed from the content of the opinion and coupled with the misleading statement of the stipulated facts, presents an erroneous picture of the questions involved.

The quotation above mentioned was a part of the Court's statement in reference to the claim of Respondent on the question of the nature of the contract entered into between the union (of which the plaintiffs were members), and the Respondent corporation. This question was not passed upon by the Circuit Court of Appeals and is not raised by the petitioner in his petition for a Writ of Certiorari, and therefore can have no place in the presentation of his petition.

The additional stipulated facts (R. 19) did not alter the situation. There was an ample showing that the establishment of the Respondent was a service establishment. The claim of the plaintiffs was based upon a misinterpretation of the *Kirschbaum vs. Walling* case, 316 U. S. 517. The plaintiffs (petitioners in the case at bar) based their claim upon the nature of the business of the customers of their employer and even stretched this concept to cover the work of the employees of the customers of the Respondent, in order to attempt a tie-up with production of goods for commerce.

Petitioner proceeds at great length to state what he would have proved if he had been given an opportunity so to do, apparently overlooking the "Issues of Fact" which were stipulated by the respective counsel for the parties (R. 12, 13). It was the plaintiff (Petitioner herein) who forced the issue by urging and securing a stipulation of facts and then filing two separate motions for a judgment upon the pleadings and the stipulated facts. The court passed upon the issues presented by the plaintiffs.

The respondent is engaged in the washing and cleaning of windows on buildings located wholly within the State of Michigan. It contracts to perform the services of washing and cleaning windows on any and all buildings in the State of Michigan and employs workmen to do the work of the washing and cleaning of windows (R. 19). It neither owns nor leases the buildings upon which the work is performed, and has nothing whatever to do with, and no control over, the activity going on in the building and is not at all concerned with the activity of the persons for whom it washes and cleans windows.

The petitioner and other employees of the Respondent, are members of Local 139 Detroit Window Cleaners Union, American Federation of Labor, and were such members for

a number of years previous to 1939 and up to and including the date of the litigation now pending. The Union, acting for and in behalf of the Petitioner and other employees of Respondent, had made an agreement with the Respondent and had renewed it for a number of years preceding and including 1939, up to and including the time of commencement of the present suit (R. 11).

The payment of compensation by Respondent to its employees, including the petitioner, was in accordance with the agreement providing for upwards of $1.15 per hour and time and one-half for over 44 hours, between the Petitioner and the union on one hand, and the Respondent on the other. The agreement referred to and those agreements that preceded it, were freely, voluntarily and in good faith entered into between the union acting on behalf of its members and authorized so to do, and the Respondent. All the agreements executed between the union on behalf of its members and the Respondent from the time their relations first began were fully observed by the Respondent. The agreement between the parties in existence at the time suit was started, and its predecessors, provided for a closed shop (R. 11).

Petitioner is Not Entitled to Writ of Certiorari

(1) The decisions of the District Court and of the Circuit Court of Appeals in the present case are in conformity with the decision in the case of *Kirschbaum vs. Walling*, 316 U. S. 517, and other cases.

(2) The decisions of the lower courts in the present case conform to similar decisions in other circuits.

(3) The decisions of the lower courts are not erroneous, but follow the opinions of this court and other Circuit Courts of Appeal.

(4) There was no error committed in the lower court.

ARGUMENT AND LAW

The brief of Petitioner indulges in legal sophistry, and conclusions based thereon, which if sustained, would reduce the obvious intent of the law to an absurdity. Petitioner in this way seeks to read into the law a provision never intended, namely, that the criterion for coverage is not what business the employer is engaged in but the business that the customer of the employer is engaged in and the type of work employees of the customer are engaged in. Nowhere in the law is there any excuse or basis for such assumption.

The decisions of the District Court and of the Circuit Court of Appeals in the present case are in conformity with the decision in the case of Kirschbaum vs. Walling, 316 U. S. 517, and other cases.

The criterion of coverage is not what Petitioner would have it appear. All of the cases cited in Petitioner's brief very clearly indicate that each case must be decided upon its own facts and circumstances and that there can be no set rule governing all situations.

The case of *Kirschbaum vs. Walling*, 316 U. S. 517, 86 L. Ed. 1638, chiefly relied upon by the Petitioner to sustain his alleged cause of action very definitely puts the Petitioner out of court. The attorneys for the Government in that case stated (page 1642):

> "The statute does not attempt to enumerate what processes or occupations are 'necessary to the production.' That question is rather left to be determined upon the facts of individual cases as they arise" (citing cases).

Mr. Justice Frankfurter, on pages 1647 and 1648, said:

> "Unlike the Interstate Commerce Act and the National Labor Relations Act and other legislation, the Fair Labor Standards Act puts upon the courts the independent responsibility of applying *ad hoc* the general terms of the statute to an infinite variety of complicated industrial situations. Our problem is, of course, one of drawing lines. But it is not at all a problem in mensuration. There are no fixed points, though lines are to be drawn. The real question is how the lines are to be drawn—what are the relevant considerations in placing the line here rather than there. To that end we have tried to state with candor the larger considerations of national policy, legislative history, and administrative practicalities that underlie the variations in the terms of congressional commercial regulatory measures, and which therefore should govern their judicial construction."

A very important distinction explicitly stated in the *Kirschbaum v. Walling* case has apparently been completely overlooked by counsel for Petitioner. Mr. Justice Frankfurter, on page 1649, said:

> "The petitioners' buildings cannot be regarded as 'service establishments' within the exemption of Sec. 13(a) (2), 29 USCA, Sec. 213(a) (2). *Selling space in a loft building is not the equivalent of selling services to consumers*, and, in any event, the 'greater part' of the 'servicing' done by the petitioners here is not in intrastate commerce" (Italics ours).

This distinction by Mr. Justice Frankfurter clearly shows that exemption under Sec. 13(a) (2) does have a different criterion for coverage.

In other words, while the courts have decided that the general test of coverage is the work of the individual employee, *the test of the exemption under* 13(a) (2) *is the business of the employer.* (Italics ours.)

In the case at bar Respondent is a Michigan corporation, engaged in the business of washing and cleaning windows for consumers. It is very definitely a service establishment. It sells nothing but its services and the services of its employees in washing and cleaning windows. It produces no goods; it sells no goods and is not engaged, and none of its employees, is engaged in "producing, manufacturing, mining, handling, transporting or in any other manner working on such goods or in any process or occupation necessary to the production thereof."

All the legal sophistry so ingeniously employed by Petitioner can not change the nature of the work and the business engaged in by the Respondent.

In the case of *McLeod v. Threlkeld*, 319 U. S. 491, 87 L. Ed. 1539, the Circuit Court of Appeals for the Fifth Circuit held that a cook employed to prepare and serve meals to maintenance of way employees of the Texas and New Orleans Railway Company was not engaged in commerce within the meaning of the Fair Labor Standards Act and therefore not entitled to recover for overtime. The defendants were a partnership with a contract to furnish meals to maintenance of way employees of the railroad, an interstate carrier. The meals were served in a cook and dining car attached to a particular gang of workmen and running on the railroad's tracks. Employees paid the contractor for their meals. The petitioner worked as a cook in various points in Texas along the line of road during the period in question. The Supreme Court upheld the Circuit Court of Appeals that the employee was not engaged in commerce under the Fair Labor Standards Act.

The decision in the case at bar follows the decision of the Sixth Circuit Court in the case of *Lonas v. National Linen Service Co.*, 136 Fed. 2nd 433, in which case this Court denied certiorari (320 U. S. 785).

The facts in the case at bar are very similar to the facts in the *Lonas* case. Prior to the decision in the *Lonas* case, the District Judge in his opinion filed February 3, 1943 (R. 17), said:

> "It is well to note, however, that in the Court of Appeals decision of this same case, 124 Fed. (2nd) 572-3 the court in suggesting illustrations of what Congress meant by 'service establishments' specifically mentioned
>
> > 'barber shops, beauty parlors, shoe-shining parlors, clothes pressing clubs, laundries, automobile repair shops.'
>
> "Evidently, therefore, that court with a broad and liberal interpretation of the Fair Labor Act in mind and desirous of accomplishing the objective of Congress on as broad a basis as possible, included 'laundries' among those exemptions. Of course the court evidently meant 'clothes laundries' but is there a great deal of difference between the ultimate functions of a laundry for clothes and a laundry for windows? What the Court of Appeals said, however, in quoting the foregoing illustrations from another decision is only dictum, but we believe there is a distinction between the facts in the Kirschbaum case and the facts here. In the Kirschbaum case the employees were all part of and went with the rental of the buildings. Kirschbaum wasn't furnishing 'service' as such. But here the defendant was furnishing window washing and this in our opinion makes it obviously a service.
>
> "Evidently Congress anticipated the possibility of purely service establishments rendering service to those engaged in interstate commerce and those not so engaged. Otherwise why did it so word the exemption as to exclude those service establishments where the greater part of their service was done in intrastate commerce?"

Following the decision in the *Lonas* case, supra, the District Court Judge filed an opinion on July 13, 1943, and said:

> "The question here then is:
>
> "'Is a service establishment engaged in interstate commerce because its employees (who do not go out of the state to work) do render service to customers who are admittedly engaged in interstate commerce, which service indirectly aids those customers "in the production of" their "goods for interstate commerce," and which service amounts to more than 50 per cent of the service establishment's business?'
>
> "If the position contended for by plaintiff is a correct statement of the law, then a comparatively few people, service establishments or otherwise, would not be included as subject to the Fair Labor Standards Act. If rendering the service of washing windows in a building for occupants who are engaged in interstate commerce automatically makes the window washers engaged in interstate commerce it would be difficult under our complex economical and commercial life to conceive a situation where any workman would not come under the Act. From this conclusion it would be but another step to hold that a window washing company that served a hotel would have to find out from week to week what the occupants of the several hotel rooms did for a living, whom they were representing, if their firms were engaged in interstate commerce. Soon the law's applicability would be '*reductio ad absurdum.*'
>
> "And this was not the decision in *Kirschbaum v. Walling*, 316 U. S. Reports 517. There the window washers, janitors and elevator operators were part of the establishment that was rented to the company engaged in interstate commerce."

The cases cited by Petitioner are not applicable because they are based upon Petitioner's misapplication of the

facts and his distortion of the decisions, in an attempt to make them conform with the facts in the case at bar.

In the case of *White v. Jacobs Pharmacy*, 47 Fed. Sup. 298 (District Court N. D. Georgia, Atlanta Division) the Court on page 299, said:

> "It may be stated at the outset that while in applying the provisions of Sections 6 and 7 of the Fair Labor Standards Act the test of coverage related to the nature of the employment of the particular employee (*Fleming v. A. B. Kirschbaum*, 3 Cir., 124 F. 2nd 567), as concerns exemptions 'the criterion used in Section 13(a) (2), on the other hand is based upon the nature of the business conducted by the employer.' *Interpretative Bulletin No. 6, Wage & Hour Division, Fleming v. A. B. Kirschbaum, supra*, 124 F. 2d at page 570, note 2. This distinction clearly appears from the words of the statute. Thus in dealing with the present case the true question is the nature of the business conducted by the defendant. * * *
>
> "It thus appears from the interpretation of the Administrator, as well as from the contention of the plaintiff in this case, that the sole fact relied upon to remove the defendant's operation from the effect of the exemption is the physical location of its office and warehouse, as well as the fact that its branches are located in eighteen separate buildings instead of one building. The operations of the plaintiff meet every test laid down by the Wage & Hour Division except that of physical location. Nothing is found within the terms of the statute which justifies a determination of the question of whether an enterprise is or is not a retail establishment predicated solely upon the physical location of its component parts. It appears rather that it was the clear intention of Congress to remove the effect of the operation of the statute from those firms engaged in retail selling either intrastate, or when even the 'greater part of whose selling * * * is in intrastate commerce.' It is the nature of the

> business rather than the location or locations in which it is conducted which determines coverage or exemption under the statute."

In the case of *Walling v. Rolland Electric Co.*, 54 Fed. Sup. 733, District D, Maryland, the Court approvingly quoted the case of *Lonas v. National Linen Service Co.*, and the decision of the Circuit Court of Appeals in the case at bar.

In the case of *Twyman et al v. Milk Bottlers Federation*, 47 N. Y. Sup. 2nd Series, 206, the Court held that the business of the defendant was that of a service establishment and that as such it was within the exception provided for in the second clause of subdivision (a) Section 213 of the Fair Labor Standards Act.

In the case at bar the various tests applied to determine whether a concern is a service establishment lead to the inevitable conclusion that the Respondent meets these tests and is a service establishment.

The Respondent performs services directly for the consumer, namely, it washes windows for the consumer who occupies the building. The employees are employees of the Respondent under the direct supervision and control of Respondent. The Respondent hires its own employees and then details the work to be done by the employees. The Respondent is not in any way connected with, nor are its employees connected with, either the buildings in which they wash windows or any of the proceedings or activities maintained in the buildings.

In the case of *Gavril v. Kraft Cheese Co.*, 42 F. Supp. 702, District Judge Campbell, on page 704, said:

> "In order to clarify activities of the employee, however, it is necessary to consider the activities of the employer by whom he is engaged."

As previously stated in this Reply Brief, Mr. Justice Frankfurter, in the *Kirschbaum* case, supra, distinguished the facts in that case: The employees in the *Kirschbaum* case, supra, were actually engaged in the production of goods for commerce. The companies for whom they worked rented the buildings to manufacturers engaged in interstate commerce. The building employees provided the elevator service which carried the goods in and out of the building, operated the boilers which provided the heat for the manufacturing enterprises. The owners of the buildings were not engaged in servicing to customers. They were renting space to manufacturing establishments. The Government, in its brief, as quoted in the Supreme Court decisions, clearly posited its claim on the employer being engaged in interstate commerce in that its employees actively participated in the handling of goods in interstate commerce. The Government claimed (page 1643):

> "The activities of maintenance employees such as those here involved constitute processes or occupations necessary to production within the meaning of Sec. 3(j), 29 USCA, Sec. 203(j)" (citing cases).

And again on page 1643:

> "Petitioner's freight elevator operators are also 'engaged in commerce' within the meaning of Sec. 6 and 7, 29 USCA, Sections 206, 207" (citing cases).

And on page 1644:

> "Performance of the carrier's contract for interstate transportation is completed only when delivery is accepted by the consignee, the manufacturer, at his own premises on a certain floor of petitioner's building" (citing cases).

In the case of *Lonas v. National Linen Corp.*, 136 Fed. 2nd, 433, cert. denied 320 U. S. 785, Judge Simons said:

> "We find no support for this interpretation in the language of the exemption section. Two enterprises are therein exempted, one a retail establishment and the other a service establishment, the exemption of each subject to the condition that in the case of the retail establishment the greater part of its selling must be in intra-state commerce, and in the case of a service establishment, the greater part of its servicing must be in intra-state commerce. Had the Congress intended to limit the exemption of service establishments to those who perform services for private enterprises, it would have had little difficulty in clearly expressing such purpose."

The scope of applicability of exemptions was outlined in the Interpretative Bulletin No. 6, issued December 7, 1938, by the Administrator of the Wage and Hour Law, which is contained in the Wage and Hour Reference Manual, Volume 1, page 76, as follows:

> "It should be noted that the test prescribed in sections 6 and 7 is related to the nature of employment of the particular *employee. The criterion used in Section* 13(a) (2), *on the other hand, is based upon the nature of the business conducted by the employer.* Thus, under sections 6 or 7 *some* employees of a given employer may be covered and others may not be covered. If, however, the exemption provided by Section 13(a) (2) is applicable because the greater part of the selling or servicing by the retail or service establishment is in intra-state commerce *all* employees of the establishment are exempted from Section 6 and 7." (Italics ours). (The exemption of Section 13(a) (2) applies to service companies, as in the case at bar.)

Nowhere in the law or in the adjudicated cases is there any basis for the position claimed for the Petitioner, namely, that in the statutory exemption the criterion is the nature of the work engaged in by the customers of an employer or the employees of a customer of an employer. The nature and extent of the employer's or establishment's business is the determining factor.

Petitioner's brief, in attempting to distinguish the *Lonas* case, supra, attempts to narrowly define a single phrase of the statute, as well as leaving out and ignoring the very significant phrase, "the greater part of whose selling or servicing is in intra-state commerce." Nowhere in any adjudicated cases is there support for the interpretation contended for by Petitioner, to circumscribe the word "establishment" as meaning a particular building in which the employer may have his office. Obviously, a service establishment is a service company and the word "establishment" is not intended to mean a building. Petitioner's construction tortures the English language beyond recognition.

CONCLUSION

The interpretation sought by the Petitioner would read into the law language never intended by Congress. If it had been the intent of Congress to include all activities affecting commerce, then certainly the statute would so have provided. The statute, however, explicitly states the Congressional finding and declaration of policy, among which are the following words:

> "The Congress hereby finds that the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum

standard of living necessary for health, efficiency and general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) *leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce;* and (5) interferes with the orderly and fair marketing of goods in commerce." (Italics ours.)

Under "Definitions" in Section 203 of the Act, we find:

"'Goods' means goods (including ships and marine equipment), wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof, but does not include goods after their delivery into the actual, physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof.

"'*Produced*' *means produced, manufactured, mined, handled, or in any other manner worked on* in any State; and for the purposes of this chapter an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof, in any State." (Italics ours.)

The Act then goes on to provide for the appointment of industry committees, for each industry engaged in commerce or in the production of goods for commerce. (Section 205 of the Act.)

Section 206 of the Act then provides for minimum wages starting at 25c an hour, up to 30c an hour. Section 207

provides for the maximum hours of employees covered by the Act. Section 208 sets forth the main objective, and says:

> "(a) With a view to carrying out the policy of sections 201-219 of this title by reaching, as rapidly as is economically feasible without substantially curtailing employment, *the objective of a universal minimum wage of* 40 *cents an hour in each industry engaged in commerce* or in the production of goods for commerce, the Administrator shall from time to time convene the industry committee for each such industry, and the industry committee shall from time to time recommend the minimum rate or rates of wages to be paid under section 206 of this title by employers engaged in commerce or in the production of goods for commerce in such industry or classification therein." (Italics ours.)

Section 213 provides the exemptions. It is the claim of the Respondent that its business comes within the exemption.

A reading of the entire Act, the purposes for which it was enacted, the objectives sought to be obtained, clearly shows that the lower courts did not err in arriving at their decisions in the case at bar.

Petitioner attempts to create a situation which is far removed from the purposes and objectives of the Fair Labor Standards Act. As stated by this Court in the case of *United States v. American Trucking Associations,* 310 U. S. 534; 84 L. Ed. 1345, page 1350:

> "In the interpretation of statutes, the function of the courts is easily stated. It is to construe the language so as to give effect to the intent of Congress. There is no invariable rule for the discovery of that intention. To take a few words from their context and with them thus isolated to attempt to determine their meaning, certainly would not con-

tribute greatly to the discovery of the purpose of the draftsman of a statute, particularly in a law drawn to meet needs of a major occupation."

It is the contention of Respondent that the position of the Petitioner is untenable. There is no question but that the Respondent is a service establishment. There can be no question but that the Respondent comes squarely within the exemptions of the Statute. We therefore respectfully submit that the petition of the Petitioner should be denied, with costs to this Respondent.

Respectfully submitted,

LARRY S. DAVIDOW,
Attorney for Respondent.

No. 21

Supreme Court of the United States

OCTOBER TERM, 1945

THOMAS MARTINO,
PETITIONER

v.

MICHIGAN WINDOW CLEANING COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENT

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BRIEF OF RESPONDENT

OPINIONS BELOW

Pertinent statements of the lower Court's opinions will be cited in the argument and Brief to follow.

JURISDICTION

Petitioner's statement of jurisdiction fails to mention the fact that Certiorari was originally denied by this Court on February 26, 1945. Thereafter Certiorari was granted *sua sponte* by this Court on June 18, 1945.

QUESTIONS PRESENTED

The questions now presented by Petitioner in his present brief are at variance not only with the questions presented in the petition for the Writ of Certiorari but the questions submitted by him to the Circuit Court of Appeals.

In the Petitioner's Brief (page 2), the second question has been changed materially. The original question presented by the Petitioner in his application for a Writ of Certiorari was:

> "Whether employees who spend the greater part of their time washing windows in buildings in which goods are produced for interstate commerce are 'engaged in the production of goods for commerce' within the meaning of the Fair Labor Standards Act."

The question now presented by the Petitioner is based upon a single clause separated from the full meaning and content of the definition contained in the Fair Labor Standards Act. The Act reads:

> "Sec. 3. As used in this Act * * *
>
> (j) 'Produced' means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act an employe shall be deemed to have been engaged in the production of goods if such employe was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof, in any State."

The third question presented by the Petitioner was never raised in the Circuit Court of Appeals.

COUNTER-STATEMENT OF QUESTIONS INVOLVED

It is the contention of the Respondent that the questions involved, based upon the content of the opinions of Judge Picard (R. 14-16 and R. 17-21) are:

> "1. Is a concern, exclusively engaged in washing windows of buildings, which it does not own or control, all of which buildings are located within the State of Michigan, a 'service establishment' within the meaning of Sec. 13 (a) of the Fair Labor Standards Act of 1938?
>
> 2. Since the concern is a 'service establishment' within the meaning of the law, does the exemption operate if the concern is engaged exclusively in servicing buildings located only in the State of Michigan?"

In addition to the foregoing questions which were decided upon by the District Court and the Circuit Court of Appeals, the Respondent submitted the following question which, while not decided by the Circuit Court of Appeals, is pertinent to the case at bar to indicate the background of the relations between the employer (Respondent) and the employee (Petitioner).

> "3. May employees maintain a suit for additional overtime pay, damages and attorneys' fees under the Act, where a bona fide agreement was entered into as a result of collective bargaining, between them through their legal representative union and the employer, said agreement covering hours of labor, rates of pay and overtime pay, closed shop provisions, based upon a mutual understanding and belief that the Fair Labor Standards Act did not apply to the employees, which said agreement had been fully consummated and adhered to by the parties?"

STATUTE INVOLVED

While Petitioner in his Brief submitted what he terms pertinent provisions of the Fair Labor Standards Act, it is Respondent's position that the entire Act must be taken into consideration, particularly the Congressional findings and declaration of policy, as stated in the Statute as follows:

> "The Congress hereby finds that the existence, in *industries engaged in commerce or in the production of goods for commerce*, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency and general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) *leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce;* and (5) interferes with the orderly and fair marketing of goods in commerce." (Italics ours.)

Sections 205 and 208 are important in order to gain a proper perspective of the workings of the Act and which clearly show the purposes intended by Congress in the passage of the Act.

Section 213 provides the exemptions which Respondent contends covers its employees.

COUNTER-STATEMENT OF FACTS

A.

A reading of the Petitioner's statement would lead one to such an erroneous conclusion of facts that Respondent is compelled to submit a Counter-statement of Facts which are essential to a proper understanding of the controversy.

The Respondent is engaged in washing and cleaning of windows on buildings located wholly within the State of Michigan. It contracts to perform the services of washing and cleaning windows on any and all buildings in the State of Michigan and employs workmen to do the work of washing and cleaning of windows. It neither owns nor leases the buildings upon which the work is performed, and has nothing whatever to do with, and no control over, the activity going on in the building and is not at all concerned with the activity of the persons for whom it washes and cleans windows (17-19).

The Petitioner, employee of the Respondent, is a member of Local 139, Detroit Window Cleaners Union, American Federation of Labor, and was such member for a number of years previous to 1939 and up to and including the date of the litigation now pending. The Union, acting for and in behalf of the Plaintiffs and Appellants, had made an agreement with the Defendant and had renewed it for a number of years preceding and including 1939, up to and including the time of commencement of the present suit (R. 10).

The payment of compensation by Defendant to its employees, including the Plaintiffs in this suit, was in accordance with the agreement between the Plaintiffs and the Union on one hand, and the Defendant on the other. The agreement referred to and those agreements that preceded it, were freely, voluntarily and in good faith entered into between the Union acting on behalf of its members and auth-

orized so do do, and the defendant employer. All the agreements executed between the Union on behalf of its members and the Defendant from the time their relations first began were fully observed by the Defendant. The agreement between the parties in existence at the time suit was started, and its predecessors, provided for a closed shop. (R. 10.)

B.

Stipulations of Fact were entered into by counsel for the respective parties in the District Court. (R. 9-12.) Following this, Petitioner (Plaintiff) filed his Motion for Summary Judgment. (R. 12-13.) The District Court never directed Petitioner to renew a Motion for Summary Judgment. The District Court, in his first opinion filed February 3, 1943, said the following in his concluding paragraph (R. 16):

> "The motion for summary judgment is therefore denied and proofs will be taken unless the facts can be further stipulated."

Subsequently, three months after the first opinion by the District Court, additional facts were stipulated. (R. 16-17.) On June 15, 1943, Petitioner renewed his Motion for Summary Judgment and in the motion of Petitioner is found the statement (R. 17.):

> "This motion is submitted on briefs, in accordance with the instructions of the Court."

In other words, Petitioner is now attempting to transmute his own statement into a directive from the District Court. The directive was for no further argument and not for the filing of the motion. This is clearly set forth in the motion by the Petitioner in the District Court in which nowhere does it appear that the motion itself was directed by the Court.

After the Petitioner renewed his motion for Summary Judgment and counsel for the respective parties had filed

their briefs, the District Judge on July 14, 1943, filed his opinion denying Petitioner's motion and ordered a judgment to be entered in favor of the Respondent (Defendant) in accordance with his opinion (R. 17-21).

Petitioner's statement of the finding of the District Court is at variance with the language employed by the trial court. The trial court found:

> "Sixth: The Court finds, however, that the defendant herein is a service establishment, the greater portion of whose servicing is in intrastate commerce, and that the defendant comes within the exemption covered by Section 13 (a) (2) of the Fair Labor Standards Act." (R.22.)

C.

Petitioner's summary of argument consists of a series of statements of conclusions based upon erroneous and misleading facts. Petitioner makes a statement and therefore assumes that by the making of the statement it must necessarily be true. The summary includes facts which were never submitted or passed upon by either the District Court or the Circuit Court of Appeals. The conclusions of fact now relied upon by the Petitioner are based upon a shifting of position by the Petitioner from the broad aspects of the definition used in the Act (Section 3, j) and an attempted limiting of the discussion and argument to an isolated clause in one paragraph of the definition.

D.

Again we call this Court's attention to the fact that the question as to whether the complaint of the Petitioner in the lower court was dismissed on the court's own motion was never presented to the Circuit Court of Appeals, and was raised for the first time in the petition for Writ of Certiorari to this Court.

ARGUMENT

I.

The brief of Appellant indulges in legal sophistries, and conclusions based thereon, which if sustained, would reduce the obvious intent of the law to an absurdity. Petitioner in this way seeks to read into the law, Section 13 (a) (2) of the Fair Labor Standards Act, a provision never intended, namely, that the criterion for coverage is not what business the employer is engaged in but the business that the customer of the employer is engaged in and the type of work employees of the customer are engaged in. Nowhere in the law is there any excuse or basis for such assumption.

Petitioner quotes extensively from interpretative bulletin No. 6 of the Fair Labor Standards Act. In view of the fact that the case at bar devolves upon the exemptions contained in Section 213 of the Act, it is necessary that we examine this interpretative bulletin No. 6 to see what it has to say on the applicability of exemptions. In the Wage and Hour Reference Manual, volume 1, page 56, we find the following quotation from interpretative bulletin No. 6:

> "It should be noted that the test prescribed in sections 6 and 7 is related to the nature of employment of the particular *employee. The criterion used in Section* 13 (a) (2), *on the other hand, is based upon the nature of the business conducted by the employer.* Thus, under sections 6 or 7 *some* employees of a given employer may be covered and others may not be covered. If, however, the exemption provided by Section 13 (a) (2) is applicable because the greater part of the selling or *servicing* by the retail or *service establishment* is in intra-state commerce *all* employees of the establishment are exempted from Section 6 and 7."—(Italics ours.) (The exemption of Section 13 (a) (2) applies to service companies, as in the case at bar.)

With the foregoing citation in mind, it is plain to see that Petitioner is proceeding upon an erroneous theory which is not supported by the law or the interpretative bulletin. Petitioner contends the opposite of the clear intent of the law and the interpretative bulletin, *supra*. In effect, Petitioner goes so far as to seek to maintain that the criterion for coverage is based upon the nature of the work done by employees of the customer of the Respondent.

To carry Petitioner's argument to its logical conclusion would necessitate that every service establishment,—cleaners, barbers, laundries, window-cleaners, make inquiry of their respective customers as to the nature of the work that they or their employees are engaged in, in order to ascertain whether employees of the service establishment are to be covered by the Act.

The District Judge in his opinion filed February 3, 1943 (R. 14-15), said:

> "It is well to note, however, that in the Court of Appeals decisions of this same case, 124 Fed. (2nd) 572-3, the court in suggesting illustrations of what Congress meant by 'service establishments' specifically mentioned
>
> 'barber shops, beauty parlors, shoe-shining parlors, clothes pressing clubs, laundries, automobile repair shops.'
>
> Evidently, therefore, that court with a broad and liberal interpretation of the Fair Labor Act in mind and desirous of accomplishing the objective of Congress on as broad a basis as possible, included 'laundries' among those exemptions. Of course the court evidently meant 'clothes laundries,' but is there a great deal of difference between the ultimate functions of a laundry for clothes and a laundry for windows? What the Court of Appeals said, however, in quoting the foregoing illustrations from another decision is only dictum, but we believe there is a distinction between the facts in the Kirschbaum

case and the facts here. In the Kirschbaum case the employees were all part of and went with the rental of the building. Kirschbaum wasn't furnishing 'service' as such. But here the defendant was furnishing window washing and this in our opinion makes it obviously a service.

Evidently Congress anticipated the possibility of purely service establishments rendering service to those engaged in interstate commerce and those not so engaged. Otherwise why did it so word the exemption as to exclude those service establishments where the greater part of their service was done in intrastate commerce?'' (Italics ours.)

Following the decision in the case of *Lonas v. National Linen Service Co.*, 136 Fed. (2nd) 433, the District Court Judge filed an opinion on July 14, 1943 (R. 17-21), and said:

''The question here then is:

'Is a service establishment engaged in interstate commerce because its employees (who do not go out of the state to work) do render service to customers who are admittedly engaged in interstate commerce, which service indirectly aids those customers ''in the production of'' their ''goods for interstate commerce'' and which service amounts to more than 50 per cent of the service establishment's business?'

If the position contended for by the plaintiff is a correct statement of the law, then a comparatively few people, service establishments or otherwise, would not be included as subject to the Fair Labor Standards Act. If rendering the service of washing windows in a building for occupants who are engaged in interstate commerce automatically makes the window washers engaged in interstate commerce it would be difficult under our complex economical and commercial life to conceive a situation where any workman would not come under the Act. From this conclusion it would be but another step to hold

that a window washing company that served a hotel would have to find out from week to week what the occupants of the several hotel rooms did for a living, whom they were representing, if their firms were engaged in interstate commerce. Soon the law's applicability would be '*reductio ad absurdum.*'

And this was not the decision in *Kirschbaum v. Walling*, 316 U. S. Reports 517. There the window washers, janitors and elevator operators were part of the establishment that was rented to the company engaged in interstate commerce."

The case of *Phillips v. Walling*, 323 U. S., cited in the Petitioner's brief is not applicable to the facts in the case at bar. In the Phillips-Walling case, the employer operated a chain of forty-nine retail grocery stores, forty of which were in Massachusetts and nine in Connecticut. It operated a separate warehouse and office building in Springfield, Massachusetts, which served all forty-nine stores. About eighty per cent of the merchandise passing through the warehouse was received from outside of Massachusetts and this Court held that the warehouse and central office of the petitioner chain store system could not properly be considered a retail establishment within the meaning of Section 13 (a) (2) of the Act. (Page 707 of Volume 89 of the Supreme Court Lawyers' Edition Advance Opinion.) This Court discussed the elimination of the middleman in the operation of chain stores whereby chain stores assumed the duties and functions of wholesalers. This obviously brings chain stores into the realm of interstate commerce.

The facts in the Phillips-Walling case cannot apply in the case at bar becouse here we are dealing with a service establishment and not a chain retail store engaged in two states.

In discussing the *Lonas v. National Linen Service Company*, 136 F. 2nd 433, in which Certiorari was denied by this Court (320 U.S. 785), the Petitioner attempts to dis-

tinguish between the services performed by a laundry and by a window-cleaning establishment, by seeking to emphasize the fact that, in a laundry, the employees are necessarily 'engaged in it' while in the window-cleaning establishment the employees are engaged elsewhere. Petitioner's brief emphasizes only that Respondent's employees wash windows of industrial concerns and factories, whereas as a matter of fact the Record indicates that the Respondent is not exclusively engaged in washing windows of industrial concerns. Petitioner attempts to place Respondent's service establishment in the same category as 'detective agencies,' 'protective agencies' and 'auctioneers' establishments' and attempts to stretch the meaning of the ordinary words beyond recognition.

The employees of the Respondent wash windows. They do not come in contact with any of the activities engaged in by the owner of the building or business. The owner of the building and/or the owner of the business has no control or supervision whatsoever over the employees of the Respondent. The Respondent has his own place of business where his employees report for work, are assigned to their jobs and return for further orders. They would be in the same category as a chain of barber shops, cleaning establishments, laundry establishments or any retail establishments which had a staff of salesmen who visited a number of concerns in the course of their work.

The criterion of coverage is not what Petitioner would have it appear. All of the cases cited in Petitioner's brief very clearly indicate that each case must be decided upon its own facts and circumstances and that there can be no set rule governing all situations.

The case of *Kirschbaum vs. Walling*, 316 U. S. 517, 86 L. Ed. 1638, chiefly relied upon by the Petitioner to sustain his alleged cause of action very definitely puts the Peti-

tioner out of court. The attorneys for the Government in that case stated (page 1642):

> "The statute does not attempt to enumerate what processes or occupations are 'necessary to the production.' That question is rather left to be determined upon the facts of individual cases as they arise" (citing cases).

Mr. Justice Frankfurter, on pages 1647 and 1648, said:

> "Unlike the Interstate Commerce Act and the National Labor Relations Act and other legislation, the Fair Labor Standards Act puts upon the courts the independent responsibility of applying *ad hoc* the general terms of the statute to an infinite variety of complicated industrial situations. Our problem is, of course, one of drawing lines. But it is not at all a problem in mensuration. There are no fixed points, though lines are to be drawn. The real question is how the lines are to be drawn—what are the relevant considerations in placing the line here rather than there. To that end we have tried to state with candor the larger considerations of national policy, legislative history, and administrative practicalities that underlie the variations in the terms of congressional commercial regulatory measures and which therefore should govern their judicial construction."

A very important distinction explicitly stated in the *Kirschbaum v. Walling* case has apparently been completely overlooked by counsel for Petitioner. Mr. Justice Frankfurter, on page 1649, said:

> "The petitioners' buildings cannot be regarded as 'service establishments' within the exemption of Sec. 13(a) (2), 20 USCA, Sec. 213(a) (2). *Selling space in a loft building is not the equivalent of selling services to consumers*, and, in any event, the 'greater part' of the 'servicing' done by the petitioners here is not in intrastate commerce" (Italics ours).

This distinction by Mr. Justice Frankfurter clearly shows that exemption under Sec. 13(a) (2) does have a different criterion for coverage.

In other words, while the courts have decided that the general test of coverage is the work of the individual employee, *the test of the exemption under* 13(a) (2) *is the business of the employer.* (Italics ours.)

In the case at bar Respondent is a Michigan corporation, engaged in the business of washing and cleaning windows for consumers. It is very definitely a service establishment. It sells nothing but its services and the services of its employees in washing and cleaning windows. It produces no goods; it sells no goods and is not engaged, and none of its employees, is engaged in "producing, manufacturing, mining, handling, transporting or in any other manner working on such goods or in any process or occupation necessary to the production thereof."

All the legal sophistry so ingeniously employed by Petitioner can not change the nature of the work and the business engaged in by the Respondent.

In the case of *McLeod v. Threlkeld*, 319 U. S. 491, 87 L. Ed. 1539 (lightly passed over by Petitioner), the Circuit Court of Appeals for the Fifth Circuit held that a cook employed to prepare and serve meals to maintenance of way employees of the Texas and New Orleans Railway Company was not engaged in commerce within the meaning of the Fair Labor Standards Act and therefore not entitled to recover for overtime. The defendants were a partnership with a contract to furnish meals to maintenance of way employees of the railroad, an interstate carrier. The meals were served in a cook and dining car attached to a particular gang of workmen and running on the railroad's tracks. Employees paid the contractor for their meals. The petitioner worked as a cook in various points in Texas

along the line of road during the period in question. The Supreme Court upheld the Circuit Court of Appeals that the employee was not engaged in commerce under the Fair Labor Standards Act.

In this connection, we believe that Judge Picard's opinion covers the situation in the case at bar: (R. 17-21.)

"May we not add that in rendering this opinion we are aware of the difference between the interpretative bulletins and instructions of the administrator evidenced by briefs of the respective parties as directed to our attention by plaintiff. But even if the difference is as controlling as claimed by plaintiff and while this Court has often recognized that the interpretations of the administrator are entitled to 'great weight,' *U. S. v. American Trucking Associations*, 310 U. S. 534, those interpretative bulletins are not the law. As stated by Judge Simons in *Lonas v. National Linen Service Corporation, supra:*

> "The administrator * * * contends that the exemptions in paragraph 13(a) (2) are limited to establishments retail in character whether they sell goods or services. This view is based upon what he conceives to be the implications to be drawn from the legislative history of the Act and the grammatical construction of the exemption section. Since the related terms are coupled in the same sentence and are used in the disjunctive with the terms 'retail' and 'service' both modifying the word 'establishment' they refer to employers who deal directly with private consumers as distinguished from commercial and industrial customers. In other words, the service establishment exemption extends only to those establishments having the characteristic of retail stores, and the defendant's business is not a retail service establishment because 60 per cent of its customers are industrial or business concerns.
>
> We find no support for this interpretation in the language of the exemption section. Two enterprises.

> are therein exempted, one a retail establishment and the other a service establishment, the exemption of each subject to the condition that in the case of the retail establishment the greater part of its selling must be in intra-state commerce, and in the case of a service establishment, the greater part of its servicing must be in intra-state commerce. Had the Congress intended to limit the exemption of service establishments to those which perform services for private individuals as distinguished from business enterprises, it would have had little difficulty in clearly expressing such purpose."

Petitioner's specious argument, if carried to its logical conclusion, would—as the trial court stated—reduce the law's applicability to an absurdity. (R. 19.)

II.

Petitioner is attempting to apply the interpretation of the Federal statutes involving the Interstate Commerce Commission, which include businesses or operations 'affecting commerce.' That is not the interpretation to be placed upon the Fair Labor Standards Act because the definition contained in this latter Act provides (Sec. 203 (b)):

> 'Commerce' means trade, commerce, transportation, transmission, or communication among the several States or from any State to any place outside thereof.

Section 203 (i):

> 'Goods' means goods (including ships and marine equipment), wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof, but does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof.

Section 203 (j):

> 'Produced' means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this chapter an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof, in any State.

In the case of 10 *East 40th Street Building v. Callus*, decided by this Court in the October term, 1944, and reported in 89 L. Ed. Advance Opinions, pages 1245-6-7, Justice Frankfurter said:

> "The Fair Labor Standards Act of (June 25) 1938 regulates wages and hours not only of employees who are 'engaged in commerce' but also those engaged 'in the production of goods for commerce.' Sections 6, 7, 52 Stat. 1060, 1062, 1063, c. 676, 29 USCA paragraphs 206, 207, 9 FCA Title 29, paragraphs 206, 207. For the purposes of that Act 'an employee shall be deemed to have been engaged in the production of goods if such an employee was employed * * * in any process or occupation necessary to the production thereof, in any State.'" Section 3 (j), 29 USCA paragraph 203, 9 FCA Title 29, paragraph 203. When these provisions first came here we made it abundantly clear that their enforcement would involve the courts in the empiric process of drawing lines from case to case, and inevitably nice lines. *A. B. Kirschbaum Co. v. Walling*, 316 U. S. 517, 86 L. Ed. 1638, 62 S. Ct. 1116. And this for two reasons. In enacting this statute Congress did not see fit, as it did in other regulatory measures, e.g., the Interstate Commerce Act and the National Labor Relations Act, to exhaust its constitutional power over commerce. And 'Unlike the Interstate Commerce Act and the National Labor Relations Act and other legislation, the Fair Labor

Standards Act puts upon the courts the independent responsibility of applying *ad hoc* the general terms of the statute to an infinite variety of complicated industrial situations.' *A. B. Kirschbaum Co. v. Walling*, supra (316 U. S. at 523, 86 L. Ed. 1647, 62 S. Ct. 1116). Thus, Congress withheld from the courts the aid of constitutional criteria, compare, e.g. *Currin v. Wallace*, 306 U. S. 1, 83 L. Ed. 441, 59 S. Ct. 379; *Wickard v. Filburn*, 317 U. S. 111, 87 L. Ed. 122, 63 S. Ct. 82; *Polish Nat. Alliance v. National Labor Relations Board*, 322 U. S. 643, 88 L. Ed. 1509, 64 S. Ct. 1196, as well as the benefit of a prior judgment on vexing and ambiguous facts, by an expert administrative agency. Compare, e.g., *National Labor Relations Board v. Fruehauf Trailer Co.*, 301 U. S. 49, 81 L. Ed. 918, 57 S. Ct. 642, 108 A.L.R. 1372; *Gray v. Powell*, 314 U. S. 402, 412, 86 L. Ed. 301, 310, 62 S. Ct. 326.

The act has produced a considerable volume of litigation and has inevitably given rise to judicial conflicts and divisions."

And again, on pages 1246-47:

"The respondents are maintenance employees of the building, elevator starters and operators, window cleaners, watchmen and the like. They brought this suit under paragraph 16 (b) of the Fair Labor standards Act, 29 U. S. C. A. paragraph 215, 9 F. C. A. Title 29, paragraph 215, for claims of overtime payment to which they are entitled if their occupations be deemed 'necessary to the production' of goods for commerce. Concededly they are not 'engaged in commerce.' The District Court dismissed the suit. 51 F. Supp. 528. The Circuit Court of Appeals reversed. 146 F (2nd) 438. By a meticulous calculation, it found that the executive offices of manufacturing and mining concerns, sales agencies representing such concerns, and publicity concerns were engaged in the production of goods for interstate commerce, and, since the offices of these concerns occupied 42% of the rentable area and 48%

of the rented area, the maintenance employes of the owners of the building are engaged in occupations 'necessary for the production' of goods for commerce. Conflict between this result and that reached by other circuits led us to bring the case here. 324 U. S., —, ante, 565, 65 S. Ct. 678 (footnote).

"The series of cases in which we have had to decide when employees are engaged in an 'occupation necessary to the production' of goods for commerce has settled at least some matters. Merely because an occupation involves a function not indispensable to the production of goods, in the sense that it can be done without, does not exclude it from the scope of the Fair Labor Standards Act. Conversely, merely because an occupation is indispensable, in the sense of being included in the long chain of causation which brings about so complicated a result as finished goods, does not bring it within the scope of the Fair Labor Standards Act. See *Walling v. Jacksonville Paper Co.*, 317 U. S. 564, 87 L. Ed. 460, 63 S. Ct. 332; *Walter v. Southern Package Corp.*, 320 U. S. 540, 88 L. ed. 298, 64 S. Ct. 320; *Armour & Co. v. Wantock*, 323 U. S. 126, ante, 120, 65 S. Ct. 165; *Skidmore v. Swift & Co.*, 323 U. S. 134, ante, 125, 65 S. Ct. 161. In giving a fair application to paragraph 3 (j), courts must remember that the 'necessary' in the phrase 'necessary to the production of goods for commerce' is colored by the context not only of the terms of this legislation but of its implications in the relation between state and national authority.' *A. B. Kirschbaum Co. v. Walling*, supra (316 U. S. at 525, 86 L. Ed. 1548, 62 S. Ct. 116). For as was pointed out in *Walling v. Jacksonville Paper Co.*, supra (317 U. S. at 570, 87 L. Ed. 467, 63 S. Ct. 332), we cannot 'be unmindful that Congress in enacting this statute plainly indicated its purpose to leave local business to the protection of the states.' *We must be alert, therefore, not to absorb by adjudication essentially local activities that Congress did not see fit to take over by legislation.*" (Italics ours).

Petitioner attempts to limit the scope of the exemption by an interpretation of the word 'establishment' which does violence to the customary use of the word. The case at bar is not the case of the employment of an independent contractor to evade the provisions of the Act. The employees were employees of the Respondent for a number of years preceding and including 1939 and up to and including the commencement of suit in the District Court. (R. 10). The employees of the Respondent do not work on any goods, do not come in contact with any goods, do not come in contact with any of the processes used or necessary in the production of goods. They wash windows. In fact, they have less to do with the industrial concern than the laundry furnishing towels and supplies for employees, which launders and delivers the towels into the industrial plants.

In the case of *Walling v. Fred Wolferman, Inc.*, D. C. Mo. 1944, 54 F. Supp. 917, the court held that the word 'establishment' was used "not in a technical sense but in its ordinary meaning with emphasis upon the concept of permanency and without intending to limit operation of this section to a single store." Again, in this case, the court said:

> "Failure of Congress in defining certain words used in this chapter to define the word 'establishment' suggests that Congress intended it should be taken in its ordinary meaning.
>
> The word 'establishment' though used in the immediately following clause of this section, is not among the words which administrator of this chapter is authorized to define, and the rule *expressio unius est exclusio alterius* is applicable."

In the case of *White v. Jacobs Pharmacy*, 47 Fed. Sup. 298 (District Court N. D. Georgia, Atlanta Division) the Court on page 299, said:

> "It may be stated at the outset that while in applying the provisions of Sections 6 and 7 of the Fair Labor Standards Act the test of coverage related to the nature of the employment of the particular employee (*Fleming v. A. B. Kirschbaum*, 3 Cir., 124 F. 2nd 567), as concerns exemptions 'the criterion used in Section 13(a) (2), on the other hand is based upon the nature of the business conducted by the employer.' *Interpretive Bulletin No. 6, Wage & Hour Division, Fleming v. A. B. Kirschbaum, supra,* 124 F. 2d at page 570, note 2. This distinction clearly appears from the words of the statute. Thus in dealing with the present case the true question is the nature of the business conducted by the defendant. * * *
>
> "It thus appears from the interpretation of the Administrator, as well as from the contention of the plaintiff in this case, that the sole fact relied upon to remove the defendant's operation from the effect of the exemption is the physical location of its office and warehouse, as well as the fact that its branches are located in eighteen separate buildings instead of one building. The operations of the plaintiff meet every test laid down by the Wage & Hour Division except that of physical location. Nothing is found within the terms of the statute which justifies a determination of the question of whether an enterprise is or is not a retail establishment predicated solely upon the physical location of its component parts. It appears rather that it was the clear intention of Congress to remove the effect of the operation of the statute from those firms engaged in retail selling either intrastate, or when even the 'greater part of whose selling * * * is in intrastate commerce.' It is the nature of the business rather than the location or locations in which it is conducted which determines coverage or exemption under the statute."

In the case of *Walling v. Rolland Electric Co.*, 54 Fed. Sup. 733, District D, Maryland, the Court approvingly quoted the case of *Lonas v. National Linen Service Co.*, and the decision of the Circuit Court of Appeals in the case at bar.

In the case of *Twyman et al v. Milk Bottlers Federation*, 47 N. Y. Sup. 2nd Series, 206, the Court held that the business of the defendant was that of a service establishment and that as such it was within the exception provided for in the second clause of subdivision (a) Section 213 of the Fair Labor Standards Act.

In the case at bar the various tests applied to determine whether a concern is a service establishment lead to the inevitable conclusion that the Respondent meets these tests and is a service establishment.

The Respondent performs services directly for the consumer, namely, it washes windows for the consumer who occupies the building. The employees are employees of the Respondent under the direct supervision and control of Respondent. The Respondent hires its own employees and then details the work to be done by the employees. The Respondent is not in any way connected with, nor are its employees connected with, either the buildings in which they wash windows or any of the proceedings or activities maintained in the buildings.

In the case of *Gavril v. Kraft Cheese Co.*, 42 F. Supp. 702, District Judge Campbell, on page 704, said:

> "In order to clarify activities of the employee, however, it is necessary to consider the activities of the employer by whom he is engaged."

As previously stated in this Brief, Mr. Justice Frankfurter, in the *Kirschbaum* case, supra, distinguished the facts in that case. The employees in the *Kirschbaum*

case, supra, were actually engaged in the production of goods for commerce. The companies for whom they worked rented the buildings to manufacturers engaged in interstate commerce. The building employees provided the elevator service which carried the goods in and out of the building, operated the boilers which provided the heat for the manufacturing enterprises. The owners of the buildings were not engaged in servicing to customers. They were renting space to manufacturing establishments. The Government, in its brief, as quoted in the Supreme Court decisions, clearly posited its claim on the employer being engaged in interstate commerce in that its employees actively participated in the handling of goods in interstate commerce. The Government claimed (page 1643):

> "The activities of maintenance employees such as those here involved constitute processes or occupations necessary to production within the meaning of Sec. 3(j), 29 USCA, Sec. 203(j)" (citing cases).

And again on page 1643:

> "Petitioner's freight elevator operators are also 'engaged in commerce' within the meaning of Sec. 6 and 7, 29 USCA, Sections 206, 207" (citing cases).

And on page 1644:

> "Performance of the carrier's contract for interstate transportation is completed only when delivery is accepted by the consignee, the manufacturer, at his own premises on a certain floor of petitioner's building" (citing cases).

III.

A.

Petitioner devotes almost one-third of his brief on an assumption of fact which was neither admitted nor an issue in either of the lower courts, namely, the necessity of washing windows. Respondent respectfully submits that the question of the advisability of window cleaning would have been a disputed question of fact if the case had gone to trial. However, the District Court having found in his opinion of February 3, 1943 (R. 14-16), that the Respondent was a service establishment, which he affirmed in his opinion filed July 14, 1943 (R. 17-21), the question thereafter was whether or not the greater portion of Respondent's servicing was interstate or intrastate. The trial court found all of the servicing was done within the State of Michigan on buildings located in the State of Michigan and held accordingly that the service was intrastate.

Nowhere in the Act is there any basis for the assumption of the Petitioner that, because a service may affect commerce in some remote way, it automatically comes within the purview of the Act. Again, we respectfully submit that Petitioner's position is based upon a single phrase removed from the paragraph of the definition of the word "produced" (Section 203 of Fair Labor Standards Act), whereas the entire paragraph must be read together in its relation to the entire Act.

Under "Definitions" in Section 203 of the Act, we find:

> "'Goods' means goods (including ships and marine equipment), wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof, but does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof.

> "'Produced' means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this chapter an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof, in any State." (Italics ours.)

Respondent further submits that this present position of the Petitioner is a shift from the position originally taken in an attempt to enlarge the scope of the Act. It is based upon an erroneous conclusion of fact.

It may be well to call attention at this time to the fact that industry generally all over the country and particularly in Detroit has been operating on a twenty-four hour basis for a number of years, so that workers were employed under artificial light for at least as many hours a day as those who were working days. Further, even those working during the daylight hours are very frequently working under artificial light because all machinery and equipment are not built around the outside portions of factory buildings where the windows are located. May we also be permitted to call to the court's attention the fact that new developments in architecture of buildings, both industrial and private, which have already been put into effect, call for buildings without any windows at all.

Petitioner's brief having been delivered to counsel for Respondent just three weeks before the date the cause was noticed for argument, there has not been sufficient time for the research necessary to answer completely the complicated deductions presented by the Petitioner. Respondent contends that this issue is a new one introduced for the first time in this Court (R. 11-12) and should not be considered.

B.

Petitioner insists upon a conclusion of fact which has no foundation in the case at bar, namely, that Respondent sends its employees into manufacturing plants. Employees of Respondent are not sent 'into' manufacturing plants in the sense employed by Petitioner. Employees of Respondent wash windows. The windows are in the outside walls of buildings. We can safely assume that the washing of windows is not an occupation requiring many hours every day in every industrial plant as Petitioner would like to infer.

In 20 *Corpus Juris*, 1257, we find the definition of '*engaged in*' as "employed at; transacting or carrying on the work or business or service for which one is employed." In 21 *Corpus Juris* 904, we find that '*establishment*' among other things means "*an institution.*" An institution is defined in 32 *Corpus Juris*, 942:

> "* * * The term is sometimes used as descriptive of the establishment or place where the business or operations of a society or association are carried on; at other times it is used to designate the organized body, and sometimes it is used in both of these senses. '*Institution*' may include not only its property, but also all of its legitimate activities that are consistent with, and in furtherance of, the purposes for which it was organized."

Would Petitioner contend that employees driving delivery wagons for a retail establishment are outside of the exception of the law because not engaged in the "establishment"? What about itinerant salesmen, truck drivers, delivery-men, taxicab operators, street car conductors and motorman, street-cleaners, etc., who are not "engaged in 'the' establishment" of their employers according to Petitioner's definition? We ask the questions so as to indicate the absurdity of the Petitioner's position.

IV.

The third question submitted by Petitioner has been raised for the first time in this Court. It was not presented in the Circuit Court of Appeals as the Record will show. In the case of *Helvering v. Minnesota Tea Company*, 296 U. S. 378, 80 L. Ed. 284, this court held that a point which was not raised prior to the Petition for Certiorari will not be considered.

However, we do wish to bring pertinent facts to the attention of this Court. The District Court did not of its own motion dismiss the complaint. The District Court denied the Petitioner's motion for summary judgment on February 3, 1943. (R. 16). Thereafter, on May 6, 1943, additional stipulation of facts was filed. (R. 16-17). Following that, on June 15, 1943, the Petitioner (plaintiff) renewed a motion for summary judgment as follows:

"RENEWAL OF MOTION FOR SUMMARY JUDGMENT

(Filed June 15, 1943)

To the Court:

The plaintiff renews the previous motion for summary judgment which was heretofore decided by this Court.

This motion is based on the records, pleadings, and the Stipulation of Fact, and in particular on the Further Stipulation of Facts recently filed in this Court and cause.

This motion is submitted on briefs, in accordance with instructions of the Court.

LEON A. COUSENS,
Attorney for Plaintiff."
(R. 17).

This clearly shows that the motion was not filed at the direction of the court. All the court directed was that there be no further argument and that the matter be submitted on briefs.

Petitioner's (Plaintiff's) motion was based upon 'records, pleadings, stipulation of facts.' The motion to dismiss Petitioner's (Plaintiff's) complaint was contained in the Answer and Special Defenses of Respondent (Defendant). It, therefore, became the duty of the District Court to make a determination of the case upon Petitioner's (Plaintiff's) motion, which he did in his opinion of July 14, 1943, which was followed by the Judgment and Findings At Law filed August 30, 1943. (R. 21-22).

The action of the District Court can in no way be interpreted to have been *sua sponte*. All of the proceedings were initiated by the Petitioner (Plaintiff).

Respondent further contends that an attempt on the part of the Petitioner at this time to inject suppositions as to what the proofs would have been or might have shown is out of place and should have no bearing in the case at bar. They are not based upon fact or law,—they are wholly conjectural.

It is manifestly unfair for the Petitioner to be permitted to go off into realms of possibilities, conjectures and suppositions concerning the effect of proposed testimony which might have been introduced. All of this speculation should have no place in the present proceedings.

V.

In order to have the proper background with all pertinent facts in relation to the controversy in the case at bar, Respondent believes that question number three submitted by Respondent in the Circuit Court of Appeals is necessary to be presented to this court.

MAY EMPLOYEES MAINTAIN A SUIT FOR ADDITIONAL OVERTIME PAY, DAMAGES AND ATTORNEYS' FEES UNDER THE ACT, WHERE A BONA FIDE AGREEMENT WAS ENTERED INTO AS A RESULT OF COLLECTIVE BARGAINING, BETWEEN THEM THROUGH THEIR LEGAL REPRESENTATIVE UNION AND THE EMPLOYER, SAID AGREEMENT COVERING HOURS OF LABOR, RATES OF PAY AND OVERTIME PAY, CLOSED SHOP PROVISIONS, BASED UPON A MUTUAL UNDERSTANDING AND BELIEF THAT THE FAIR LABOR STANDARDS ACT DID NOT APPLY TO THE EMPLOYEES, WHICH SAID AGREEMENT HAD BEEN FULLY CONSUMMATED AND ADHERED TO BY THE PARTIES?

It would not be amiss at this time to quote the declaration of policy set forth by Congress in the enactment of the law, among which we find:

> "Sec. 2 (a) The Congress hereby finds that the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum of workers * * * (4) *leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce*" (italics ours).

In the case at bar the agreements each year were negotiated by the employer and the employees through their duly authorized agent, a bona fide labor union. The company had the right to rely upon the good faith of its employees as represented by their agent, the union, in the negotiations and in the execution of the contracts. It is undisputed that the defendant has fully complied with all the terms of the agreements. It is undisputed that the agreement was not an attempt to circumvent the Fair Labor Standards Act. Its very provisions indicate the contrary.

In the case at bar the action of the Petitioner (plaintiff) tends to bring about the very condition which the Fair Labor Standards Act intended to minimize and eventually eliminate, namely, labor disputes. We have this anomalous

situation: A bona fide labor organization enters into a bona fide contract with an employer upon a mutual honest understanding and belief that the provisions of the Fair Labor Standards Act do not apply to the particular employer and his employees. The agreement is fully executed by the defendant employer.

Subsequently, the *Kirschbaum v. Walling* case appeared, which was decided by the United States Supreme Court and first reported in the Lawyers Edition Advance Opinions on June 9, 1942. Thereupon, plaintiffs instituted the present suit, repudiating their own agreement. In this suit plaintiffs ask for time and a half for hours for which they were paid straight time under the express terms of the written agreement voluntarily executed by them with the defendant.

In the case of *Clour v. Jones*, 42 F. Supp. 700, the plaintiff was employed by defendant as a pumper on an oil and gas lease. At the time plaintiff was discharged by defendant he was given a check for payment in full for all services theretofore performed. Prior to the time plaintiff was discharged there had been no question between him and the defendant as to overtime. Upon the trial of the case it developed that plaintiff had worked overtime and was entitled to be paid. Defendant contended that the check given was in final payment, which included all that was due the plaintiff as compensation for overtime. This was submitted to a jury and the jury found in favor of defendant's contention. Thereafter the plaintiff raised the question that he was entitled to liquidated damages for overtime for which he had already been paid in accordance with the provisions of the Fair Labor Standards Act. The Court on page 700, said:

> "One question yet remains, and that is, whether or not the plaintiff is entitled to recover the judgment for liquidated damages. The court is of the

opinion that under the facts of the case the plaintiff is not entitled to such judgment. At the time of his discharge the defendant paid the plaintiff all amounts due him. *The court is of the opinion that during the time that the plaintiff was working for the defendant, the defendant in good faith did not believe that the plaintiff came within the provisions of the Wages and Hours Law or the Fair Labor Standards Act*, 29 USCA Sec. 201 et seq. It is doubtful if prior to the time of his discharge the plaintiff himself considered that he came within the provisions of the Act. Under the state of facts the court does not believe that the defendant should be required to pay any amount as liquidated damages, having compensated the plaintiff in full for his overtime at the date of his discharge. It follows that the plaintiff's attorney is not entitled to recover any attorney's fee. The attorney for the defendant will prepare a proper form of judgment in accordance with this memorandum, and this cause is set for entry of judgment at Muskogee on June 27, 1941." (The italics are ours.)

In the case at bar we have circumstances very similar to the facts in the case of *Clour v. Jones*. We have both parties acting honestly under an interpretation of the law, namely, that the defendant employer is not engaged in interstate commerce, and that the Fair Labor Standards Act does not apply. The agreements are the result of negotiations between the employers and the union representing the employees. The union subsequently reduced the agreements to printed form and the agreements were signed by a number of employers. Defendant employer performed all of its duties and obligations under the agreement.

Walling v. Belo Corp., 316 U. S. 624, 86 L. Ed. 1716. The Supreme Court, on page 1723, said:

> "When employer and employees have agreed upon an arrangement which has proven mutually satisfactory, we should not upset it and approve an in-

flexible and artificial interpretation of the Act which finds no support in its text and which as a practical matter eliminates the possibility of steady income to employees with irregular hours. Where the question is as close as this one, it is well to follow the Congressional lead and to afford the fullest possible scope to agreements among the individuals who are actually affected."

In the case at bar there was a bona fide agreement entered into between a bona fide union representing employees and the Defendant employer. Each year as the agreement terminated, negotiations were entered into and a new agreement drawn as a result of the negotiations. All of these agreements over the course of years since the effective date of the Fair Labor Standards Acts were based upon the understanding honestly arrived at by both the union representing the employees and the defendant, that the defendant was not engaged in interstate commerce within the meaning of the Act and that the employees were not affected by the Act. There has been no judicial determination otherwise.

In June, 1942, the Supreme Court of the United States handed down its decision in the *Kirschbaum v. Walling* case, supra, which, upon first blush, appeared to include service corporations such as the respondent in the case at bar within the meaning of the Act. Shortly thereafter, the business agent of the Union instituted suit against the respondent for overtime pay and liquidated damages, which amounts to an attempt to violate the agreements honestly entered into between the parties.

The facts in the case at bar are clearly within the purview of the case of *Pittsburgh & Lake Iron Co. v. Lake Superior Iron Co.*, 118 Michigan 109. In this case the parties signed an agreement among themselves in reference to certain riparian rights and boundaries on an inland

lake, which provided for drainage of the lake, and the plaintiff mined out valuable ore in that portion which the contract awarded to it.

The theory of the plaintiff's bill of complaint was that the territory formerly covered by the water of the lake should be divided among the shore owners in proportion to the shore frontage owned by each, that such ownership extended to the center of the lake, and that the territory should be partitioned by convergent lines drawn from the outside limits to a convergent point called the equitable center. The plaintiff claimed certain pieces of land carved out of the bed of the lake, based upon this convergent point.

The defendants claimed that the agreement between the parties had settled their differences and that the agreement had been carried out between the parties, involving considerable expense to all of them and set up the defense of estoppel, laches, and the agreement of the parties executed and complied with by the defendants. Chief Justice Grant wrote the opinion, and on pages 123 and 124, said:

> "That contract was a deliberate settlement of the boundary line between the lands of the three companies and was so understood. It was of utmost importance to these parties that the boundary line be settled to beyond any possible doubt. * * * The contract, if valid, established the line beyond dispute. The first obstacle for the complainant to remove, before resorting to equitable apportionment, is this contract, recognized as valid and acted upon for nearly five years by all parties. It attempted to do this by asserting that in making that contract it relied upon the case of *Clute v. Fisher*, 65 Mich. 48, as establishing a rule that the territory should be divided by the government lines, and that it rested upon the case as the established law until the decision of *Grand Rapids Ice & Coal Co. v. South Grand Rapids Ice & Coal Co.*, 102 Mich. 227, claiming

that the latter overruled the former, and that in making that contract there was a mutual mistake which entitled it to the relief prayed."

And again on page 126:

"We find that the parties, in reliance upon that case (*Clute v. Fisher*), entered into a deliberate contract establishing their boundary lines and determined the amount of territory belonging to each. * * * The result of complainant's contention would be that whenever any case had been overruled, every transaction or agreement based upon that decision may be set aside by the courts if not barred by statute of limitations. The *agreements and settlement of parties made with full knowledge of the facts and in reliance of the law, ought to be as binding as the judgment of the court in a particular case. If ten other suits had been pending when* Clute v. Fisher *was decided and judgments had been rendered in reliance of that decision, the courts could not now set them aside.* The law is not so unstable as to permit such results. Judgments rendered and contracts made upon the faith of the law as enunciated in the decision of the court, in the absence of fraud or misrepresentation, must stand. When that decision is overruled, the overruling decision controls only subsequent transactions." (Citing cases.)

In the case of *Utermahle v. Norment*, 49 L. Ed. 655, Mr. Justice Peckham, on page 662, said:

"It has been held from the earliest days, in both the Federal and State courts, that a mistake of law pure and simple, without the addition of any circumstance of fraud or misrepresentation, constitutes no basis for relief at law or in equity and forms no excuse in favor of the party asserting that he made such mistake."

CONCLUSION

The interpretation suggested by Petitioner would read into the law language never intended by Congress. If it had been the intent of Congress to include all activities affecting commerce, then certainly the statute would so have provided. The Act sets forth the Findings and Declaration of Policy and definitions of words used in the Act.

The Act then goes on to provide for the appointment of industry committees, for each industry engaged in commerce or in the production of goods for commerce. (Section 205 of the Act). (No such committee was ever appointed for the window cleaning businesses.)

Section 206 of the Act then provides for minimum wages starting at 25c an hour, up to 30c an hour. Section 207 provides for the maximum hours of employees covered by the Act. Section 208 sets forth the main objective, and says:

> "(a) With a view to carrying out the policy of sections 201-219 of this title by reaching, as rapidly as is economically feasible without substantially curtailing employment, *the objective of a universal minimum wage of* 40 *cents an hour in each industry engaged in commerce* or in the production of goods for commerce, the Administrator shall from time to time convene the industry committee for each such industry, and the industry committee shall from time to time recommend the minimum rate or rates of wages to be paid under section 206 of this title by employers engaged in commerce or in the production of goods for commerce in such industry or classification therein." (Italics ours.)

Section 213 provides the exemptions. It is the claim of the Respondent that its business comes within the exemption.

A reading of the entire Act, the purposes for which it was enacted, the objectives sought to be obtained, clearly shows that the lower courts did not err in arriving at their decisions in the case at bar.

Petitioner attempts to creat a situation which is far removed from the purposes and objectives of the Fair Labor Standards Act. As stated by this Court in the case of *United States v. American Trucking Associations*, 310 U. S. 534; 84 L. Ed. 1345, page 1350:

> "In the interpretation of statutes, the function of the courts is easily stated. It is to construe the language so as to give effect to the intent of Congress. There is no invariable rule for the discovery of that intention. To take a few words from their context and with them thus isolated to attempt to determine their meaning, certainly would not contribute greatly to the discovery of the purpose of the draftsman of a statute, particularly in a law drawn to meet needs of a major occupation."

It is the contention of Respondent that the position of the Petitioner is untenable. There is no question but that the Respondent is a service establishment. There can be no question but that the Respondent comes squarely within the exemptions of the Statute. We therefore respectfully submit that the relief prayed for by the Petitioner should be denied, with costs to this Respondent.

Respectfully submitted,

LARRY S. DAVIDOW,
Attorney for Respondent.

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CHARLES ELMORE CROPLEY

No. 21

In the Supreme Court of the United States

OCTOBER TERM, 1945

THOMAS MARTINO, PETITIONER

v.

MICHIGAN WINDOW CLEANING COMPANY, RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE ADMINISTRATOR OF THE WAGE AND HOUR DIVISION AS AMICUS CURIAE

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE ADMINISTRATOR OF THE WAGE AND HOUR DIVISION AS AMICUS CURIAE

This is an employee suit under Section 16 (b) of the Fair Labor Standards Act. It presents questions of statutory interpretation similar to those involved in *Roland Electrical Co.* v. *Walling*, this Term, No. 45, and *Boutell* v. *Walling*, this Term, No. 73. The Administrator agrees with the position of the employees that they (1) are engaged in occupations necessary to the production of goods for commerce within the coverage of the Act, and (2) are not "engaged in * * * [a] service establishment the greater part of

whose * * * servicing is in intrastate commerce" within the exemption provided by Section 13 (a) (2).

(1) Petitioner's activities are virtually indistinguishable from the work of the janitors and porters in *Kirschbaum Co.* v. *Walling*, 316 U. S. 517, and in *Borden Co.* v. *Borella*, No. 688, 1944 Term. The only difference is that petitioners work in a number of factories instead of being assigned to a single building. This circumstance might be significant if the work were performed in plants where "no manufacturing is carried on" and were "many steps removed from the physical process of the production of goods." Cf. *10 East 40th St. Bldg.* v. *Callus*, No. 820, 1944 Term, slip op., pp. 3, 4. In this case, however, unlike the *Callus* case, the employees work in the buildings where goods are physically produced and their work, far from being remote from, is closely related to, this physical process. To differentiate between employees of the building performing such work and employees furnished for this purpose by an independent business "is to make too much turn on the accident of the division of the whole industrial process." Cf. *Callus* decision, p. 2.[1]

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[1] The device of contracting out the work appears to have been widely used in the building maintenance industry for the purpose of evading labor standards prescribed by union agreements. See Proceedings, Eighth General Convention of Building Service Employees International Union, May 6, 1940, pp. 60 et seq.

The close relationship of window cleaning to the production of goods is attested not only by common knowledge of the need of proper window lighting for efficiency and safety in production, but by the great emphasis placed upon adequate window lighting by authoritative sources on factory construction and maintenance. One such source points out that "good lighting will increase the quality of production * * *, will increase the effective hours spent on the job" by "elimination of eye strain and eye fatigue," "will increase morale" and "will increase the effectiveness of supervision." See editorial in *Factory Management and Maintenance*, March 1942 (vol. 100, no. 3, p. 101). Another authority asserts that "adequate" daylight, properly applied, is the "ideal light" and therefore "regular window cleaning should be a part of the routine of every establishment," so that dirt and dust which settle on windows and skylights do not decrease the natural light "below the level needed for safety and efficiency." See editorial in *National Safety News* (organ of the National Safety Council, Inc.), March 1940. The economic and industrial data discussed in petitioner's brief leave little doubt that the Sixth Circuit should not have found it "impossible * * * to entertain the concept" that window cleaning is necessary to the production of goods for commerce.

(2) The ruling that petitioners are excluded from the Act by virtue of Section 13 (a) (2), we submit, is likewise erroneous. As more fully developed in the Government's brief in the *Roland Electrical* case, that section was designed to exempt only establishments which cater to the local consuming public, like barber shops, filling stations and laundries. The cleaning of windows of General Motors' factories—a service essential to their successful maintenance and operation, does not even remotely resemble the "local retailing activities" contemplated by the exemption.[2] See *Phillips* v. *Walling*, 324 U. S. 490, 497.

As shown in the Government's brief in the *Roland Electrical* case, the Sixth Circuit stands virtually alone in its refusal to distinguish between personal and industrial services in applying the exemption. As there pointed out, a possible explanation of the Sixth Circuit's exceptional position is that it was first confronted with the issue in connection with a linen supply company which, while serving largely industrial and business firms, performed operations believed by the court to be indistinguishable from those of an ordinary laundry catering to private individuals. See *Lonas* v. *National Linen Service Corp.*, 136 F. 2d 433 (C. C.

[2] While there may be some window cleaning firms which specialize in residential trade, windows in homes are customarily washed by the housewife or domestic help.

A. 6), certiorari denied, 320 U. S. 785.[3] The court apparently placed considerable weight on the Census classification of linen supply companies and laundries as "Personal Services." See *id.* at 434. Whatever explanation there may be, however, of that decision, the exemption should certainly not be extended to exclude from the Act an enterprise whose normal function is the furnishing of industrial and business services and whose operations are in fact essential to the productive process.

The window washing enterprise supplies a definite "business service," very much like that of supplying watchmen. See *Walling* v. *Sondock*, 132 F. 2d 77 (C. C. A. 5), certiorari denied, 318 U. S. 772; *Walling* v. *Lum*, 7 Wage Hour Rept. 570 (S. D. Miss., 1944); *Walling* v. *Wattam*, 6 Wage Hour Rept. 1119 (W. D. Tenn., 1943); *Walling* v. *New Orleans Private Patrol*, 57 F. Supp. 143 (E. D. La.). Window cleaning services are not classified by the census as "personal services" but as "business services" along with "protective agencies" and "detective agencies," such as defendants in the *Sondock* and other cases, *supra*, "auctioneers' establishments" (held outside

[3] Ordinary laundries serving private individuals and families have generally been regarded as within the exemption because they resemble the typical "personal service" businesses, in particular, the "pants pressing" shop explicitly contemplated by the sponsors of the exemption. Linen supply companies, like the National Linen Service Corp., however, are in fact quite different from the little "pants presser."

the exemption in *Fleming* v. *Kenton Loose Leaf Tobacco Warehouse Co.*, 41 F. Supp. 255 (E. D. Ky.); *Walling* v. *Lincoln Loose Leaf Tobacco Warehouse Co.*, 6 Wage Hour Rept. 68 (E. D. Tenn., 1943); *Walling* v. *Home Loose Leaf Tobacco Warehouse Co.*, 51 F. Supp. 914 (E. D. Ky.)), "messenger services" (held outside the exemption in *Walling* v. *Allied Messenger Service*, 47 F. Supp. 773 (S. D. N. Y.)), "employment agencies" (held outside the exemption in *Yunker* v. *Abbye Employment Agency*, 32 N. Y. S. 2d 715 (Munic. Ct. N. Y., 1941)), "duplicating, addressing, mailing, and mailing list services" (see *Hanzel* v. *Hooven Letters*, 44 N. Y. S. 2d 398 (City Ct. N. Y., 1943)), etc.

Even if it be assumed that respondent is a "service establishment the greater part of whose * * * servicing is in intrastate commerce,"[4] petitioners are not "engaged *in*" such an establishment. See *Lorenzetti* v. *American Trust Co.*, 45 F. Supp. 128, 138 (N. D. Calif.), reversed on other grounds, 137 F. 2d 742 (C. C. A. 9), certiorari denied, 320 U. S. 770; *Walling* v. *New Orleans Private Patrol, supra*, at 148; *Walling* v. *Lum, supra*. As pointed out in petitioner's brief (p. 21), they work in factories which are under con-

[4] But see the decisions holding that where an establishment engages primarily in activities necessary to the production of goods for interstate commerce, the greater part of its servicing is not "in intrastate commerce" within the meaning of the exemption. These cases are cited in the Government's brief in the *Roland Electrical* case, No. 45, this Term, p. 39, n.

tracts with respondent and they hardly ever see respondent's establishment. Thus, respondent fails to meet the further condition of Section 13 (a)(2)—that the employees be "engaged in" a service establishment, that is, as it has been put, that they work in a "distinct physical place of business" devoted to performing service. See *Phillips* v. *Walling, supra*, 324 U. S., at 496. It is not sufficient that the employee be engaged *by* a service enterprise; he must be engaged *in* a service establishment. As this Court recently pointed out, this exemption from remedial legislation must be "narrowly construed." *Phillips* v. *Walling, supra*, at 493. Respondent's business, far from being "plainly and unmistakably within [the] terms and spirit" of the exemption (*ibid.*), appears to be outside of both.

Respondent argues that the Administrator's Interpretative Bulletin is inconsistent with the contention that the industrial character of the customers of the establishment makes the exemption inapplicable. In support of this argument respondent (Br., p. 8) quotes from the original 1938 version of Interpretative Bulletin No. 6, par. 4, to the effect that the criterion is "the nature of the business conducted by the employer."[5] As is clear from the succeeding paragraphs of the same Bulletin, this phrase was

[5] This Bulletin is printed in Bureau of National Affairs (1940), *Wage Hour Manual*, p. 155.

used only to distinguish the employee test which controls as to matters of coverage under Sections 6 and 7. *Kirschbaum* v. *Walling*, *supra*. It does not exclude from consideration the character of the employer's customers, which is an important factor in determining the wholesale or retail "nature of the business conducted by the employer." The test was restated with greater clarity in a revision of the Bulletin in June 1941, when the phrase "nature of the establishment" replaced "nature of the business conducted by the employer." See Interpretative Bulletin No. 6, printed in the transcript of record in No. 45, R. 25.

CONCLUSION

The decision below should be reversed.

Respectfully submitted.

HAROLD JUDSON,
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WILLIAM S. TYSON,
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OCTOBER 1945.

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No. 21

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1945

THOMAS MARTINO,
Petitioner,

vs.

MICHIGAN WINDOW CLEANING COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION OF DEFENDANT FOR REHEARING AND ARGUMENT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

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THOMAS MARTINO,

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vs.

MICHIGAN WINDOW CLEANING COMPANY.

CERTIFICATE OF COUNSEL

Larry S. Davidow, attorney for the Defendant in the above entitled cause, does hereby certify that the attached petition for a rehearing is presented in good faith and not for delay.

LARRY S. DAVIDOW.

IN THE

Supreme Court of the United States

October Term, 1945

No. 21

THOMAS MARTINO,
Petitioner,

vs.

MICHIGAN WINDOW CLEANING COMPANY.

PETITION FOR REHEARING

Now comes the Michigan Window Cleaning Company, a Michigan Corporation, by Davidow & Davidow, its attorneys, and petitions this Court for a rehearing of the above entitled cause, and says:

I.

That the opinion of the Court filed in this Court and cause shows that the same was based upon a misapprehension of the facts in the case at bar and the law applicable thereto.

II.

At the outset, we wish to call this Court's attention to the chronological history of this cause. The petition

for Writ of Certiorari was first denied by this Court on February 26, 1945. Thereafter, after a lapse of almost five months, this Court reversed itself, when certiorari was granted *sua sponte* by this Court on June 18, 1945.

III.

This case appears to have been decided upon the assumption that the facts herein were similar to the facts in the case of *Roland Electrical Company vs. Walling*, decided January 28, 1946.

A reading of the facts in the *Roland Electrical Company* case shows that they are dissimilar from the facts in the case at bar. In the case at bar the Defendant is engaged in cleaning windows. All of the plaintiffs work on the cleaning of windows. While the original complaint stated that the Defendant was engaged in "washing windows, painting and similar maintenance work," the only issue presented to the Court in the stipulation of facts and in the brief submitted, was whether window washing was a service occupation.

IV.

The opinion of this Court assumes as a fact that the cleaning of windows is essential to industry. That was a disputed question of fact, raised only after appeal, and so argued by plaintiffs but never passed upon by any of the courts.

V.

The ruling of this Court on the question of the union agreement is apparently based upon a misapprehension of the facts. This was not a case of an attempt to cir-

cumvent the Wage and Hour Law, but was an honest negotiation, at least so far as the employer was concerned, to arrive at an amicable settlement of conditions of employment with the union. The contract signed was on a form prepared and submitted by the union to the employer. If the ruling of this Court is to stand, then the action of the union in submitting and prevailing upon the employer to sign the agreement amounts to a constructive fraud against the employer.

This petition is based upon the files and records of this Court and cause and the argument in support thereof attached hereto and made a part hereof.

MICHIGAN WINDOW CLEANING COMPANY,
Defendant.

By DAVIDOW & DAVIDOW,
By Larry S. Davidow,
Attorneys for Defendant.

ARGUMENT

When the petition for certiorari was denied by this Court on February 26, 1945, the defendant assumed that the matter was disposed of. Then, after a lapse of almost five months, without warning or hearing counsel for defendant was notified that the Court had reversed itself and certiorari had been granted by this Court on June 18, 1945. The question can therefore be asked, "Why was this instant case singled out for reopening, particularly in view of the fact that as this Court has repeatedly held, each case is determined upon its own particular facts?"

Defendant is a Service Establishment

The opinion of the Court filed in this cause assumes that the facts in the case at bar are similar to the facts in the *Roland Electrical Company* case decided by this Court on January 28, 1946. A reading of the facts in the *Roland* case and the facts in the case at bar shows that the facts are altogether dissimilar.

In the case at bar the defendant is engaged in washing windows. The union representing the plaintiffs is the Detroit Window Cleaners Union, Local 139. All of the plaintiffs were or are employees of the defendant engaged in washing windows. Even using the criterion suggested by the Administrator of the Fair Labor Standards Act, the "services to an ultimate consumer," brings the services of the defendant within the meaning of the term, "service establishment." The defendant washes windows of buildings which it neither owns, occupies nor rents. It has absolutely nothing to do with the activities going

on in the building. Insofar as the defendant is concerned, its services end with the ultimate consumer, its customer. The defendant has absolutely nothing to do with any activity going on in the building. It sells nothing but its services. Its services are confined to the washing of windows on buildings. It comes in no contact at all with any of the products manufactured or produced in the building. It comes in no contact whatsoever with any of the machinery used in the production of goods. Many of its customers are private householders. Many of its customers are retail establishments. The ultimate consumer, insofar as the defendant is concerned, is the owner or occupant of the building in which are the windows washed by defendant.

The *Roland Electrical Company* case, on the other hand, involved the work on motors which were used in the production of goods for commerce. This Court has assumed that the washing of windows is an industry essential to the production of goods for commerce. The question of whether or not washing windows is necessary was a disputed question of fact which the lower court did not pass upon because it was not necessary, the cause having been decided upon the fact that the defendant was a service establishment. The question of the necessity of washing windows was first raised by the plaintiffs in their brief after certiorari was granted following the original denial of the petition for writ of certiorari. No testimony was taken and it still should be determined after all the facts have been submitted.

The question can fairly be asked: "Would any industry cease functioning if windows were not washed?" The question suggests the answer. Window cleaners have gone on strike and not a single industry has stopped.

or even been discommoded. Many industrial buildings have no windows at all. A large number of industrial buildings have frosted glass windows which certainly are not light-giving. In virtually every industrial plant, most of the work is done away from the windows, because all of the machinery is not placed around the outside walls of the plant, but is contained within the plant. During most of the time in dispute in the case at bar, many of the industrial plants had their windows "blacked out" for security reasons because of war work. Even the chamber in which this Court sits has hangings on the walls where windows might be, cutting off any natural light from the outside. The lighting in the Supreme Court chamber is achieved by artificial light, demonstrating beyond any question that the condition of windows has nothing to do with the creation of the necessary light required for the business involved. Window cleaning is far more essential in a private home than it is in any industrial building. It can be shown that window washing has absolutely nothing to do with the activities going on in an industrial building.

It is the contention of the petitioner that the decision of this Court in the case of *10 East 40th Street Building vs. Callus*, decided in the October term, 1944, reported in 89 L. Ed. Advance Opinions, 1245, 6-7, is applicable. This Court, on pages 1246 and 1247, said:

> "The respondents are maintenance employees of the building, elevator starters and operators, window cleaners, watchmen and the like. They brought this suit under paragraph 16 (b) of the Fair Labor Standards Act, 29 U.S.C.A. paragraph 215, 9 F.C.A. Title 29, paragraph 215, for claims of overtime payment to which they are entitled if their occupations be deemed 'necessary to the production' of goods for commerce. Concededly they are not

'engaged in commerce.' The District Court dismissed the suit. 51 F. Supp. 528. The Circuit Court of Appeals reversed. 146 F. (2nd) 438. By a meticulous calculation, it found that the executive offices of manufacturing and mining concerns, sales agencies representing such concerns, and publicity concerns were engaged in the production of goods for interstate commerce, and, since the offices of these concerns occupied 42% of the rentable area and 48% of the rented area, the maintenance employes of the owners of the building are engaged in occupations 'necessary for the production' of goods for commerce. Conflict between this result and that reached by other circuits led us to bring the case here. 324 U. S. ——, ante, 565, 65 S. Ct. 678 (footnote).

"The series of cases in which we have had to decide when employees are engaged in an 'occupation necessary to the production' of goods for commerce has settled at least some matters. Merely because an occupation involves a function not indispensable to the production of goods, in the sense that it can be done without, does not exclude it from the scope of the Fair Labor Standards Act. *Conversely, merely because an occupation is indispensable, in the sense of being included in the long chain of causation which brings about so complicated a result as finished goods, does not bring it within the scope of the Fair Labor Standards Act.* See *Walling v. Jacksonville Paper Co.*, 317 U. S. 564, 87 L. Ed. 460, 63 S. Ct. 332; *Walling v. Southern Package Corp.*, 320 U. S. 540, 88 L. Ed. 298, 64 S. Ct. 320; *Armour & Co. v. Wantock*, 323 U. S. 126, ante, 120, 65 S. Ct. 165; *Skidmore v. Swift & Co.*, 323 U. S. 134, ante 125, 65 S. Ct. 161. In giving a fair application to paragraph 3 (j), courts must remember that the 'necessary' in the phrase 'necessary to the production of goods for commerce' is colored by the context not only of

> the terms of this legislation but of its implications in the relation between state and national authority.' *A. B. Kirschbaum Co. v. Walling, supra* (316 U. S. at 525, 86 L. Ed. 1548, 62 S. Ct. 116). For as was pointed out in *Walling v. Jacksonville Paper Co., supra* (317 U. S. at 570, 87 L. Ed. 467, 63 S. Ct. 332), we cannot 'be unmindful that Congress in enacting this statute plainly indicated its purpose to leave local business to the protection of the states.' *We must be alert, therefore, not to absorb by adjudication essentially local activities that Congress did not see fit to take over by legislation.*" (Italics ours.)

In the case at bar, the ultimate consumer is, as we have stated above, the owner or occupant of the building. The work of the defendant does not touch any part of the equipment which produces goods for commerce or any of the goods being produced for commerce. To carry the findings of this Court to the logical conclusion, it would be necessary for the employer to ascertain what activity was being conducted in each of the buildings where windows are washed by its employees. The employer would have to make it his business to find out what business each of his customers was engaged in.

As stated by this Court in the case of *Walling vs. Jacksonville Paper Co.*, 317 U. S. 569; 87 L. Ed. 460, Headnote 4:

> "*In this connection we cannot be unmindful that Congress in enacting this statute plainly indicated its purpose to leave local business to the protection of the states.* S. Rep. No. 884, 75th Cong. 1st Sess. p. 5; 83 Cong. Rec. 75th Cong. 3d Sess. Pt. 8, p. 9169. *Moreover, as we stated in A. B. Kirschbaum Co. v. Walling, supra* (316 U. S. pp. 522, 523, 86 L. Ed. 1646, 1647, 62 S. Ct. 1116), *Congress*

did not exercise in this Act the full scope of the commerce power. We may assume the validity of the argument that since wholesalers doing a local business are in competition with wholesalers doing an interstate business, the latter would be prejudiced if their competitors were not required to comply with the same labor standards. That consideration, however, would be pertinent only if the Act extended to businesses or transaction 'affecting commerce.' But as we noted in the Kirschbaum case the Act did not go so far." (Italics ours.)

The Union Contract

The provisions of the Fair Labor Standards Act in awarding an employee not only the amount of wages he would have been entitled to, but an equal amount as liquidated damages for violation of the law, implies a wrongful act on the part of the employer in failing to abide by the law.

In the case at bar it is admitted that the defendant and the union representing the plaintiffs had entered into negotiations each year and signed agreements calling for closed shop, minimum wages, maximum hours and overtime pay. The contract was on a form prepared and submitted by the union and signed by the employer. It is undisputed that all the conditions of the contract were fully performed by the defendant employer.

The defendant employer honestly believed that the Fair Labor Standards Act did not apply to its employees. It acted honestly and fairly. If, as it now appears, the employer is to be held subject to the Act, then the action of the union in submitting the contract to the employer which the employer signed in good faith, amounts to a constructive fraud against the employer, because the

plaintiffs are now seeking to penalize the defendant for the plaintiffs' own acts. The effect of the action of the plaintiffs, if sustained, could very well mean putting the defendant and other employers similarly situated out of business. The defendant sells no goods; it performs services for others under contract. Its charges to the customers are based primarily upon the wages the defendant pays to its employees because the labor is the major part of the cost of its services. If the defendant is to be chargeable not only with the actual amount of wages, but also a penalty of like amount, together with attorneys' fees and costs, the defendant will be in a position of having to pay out large sums of money in excess of profits earned. The defendant had the right to rely upon the union contract entered into with the plaintiffs and their duly authorized representatives and in reliance upon that contract, to have entered into contracts with its customers for the services to be performed.

We respectfully submit that the facts in the instant case do involve exceptional circumstances which should lead to a rehearing in the cause. The opinion of this Court in the case of *Brooklyn Savings Bank vs. O'Neil*, referred to in the opinion in the instant case, lists the argument against waiver of the provision in the law as to liquidated damages. Not a single one of the reasons given in the *Bank vs. O'Neil* case for upholding the provision for liquidated damages applies in the instant case. In fact, Mr. Justice Reed inferred that exceptional circumstances may justify a waiver when he said "nor does the instant case involve exceptional circumstances of the kind held to justify a waiver agreement such as was upheld in *Ft. Smith & W. Ry. Co. vs. Mills*, 253 U. S. 206; 64 L. Ed. 862-4, Sup. Ct. 526."

The case of *Ft. Smith & W. Ry. Co. vs. Mills*, 64 L. Ed., 862, so referred to, involved the payment of wages agreed upon by the Receiver of the Railroad and the employees, which were lower than the rates provided for in the Adamson law. Mr. Justice Holmes, on page 863, said:

> "But the bill in Wilson vs. New raised only the general objections to the act that were common to every railroad. In that case it was not necessary to consider to what extremes the law might be carried or what were its constitutional limits. *It was not decided, for instance, that Congress could or did require a railroad to continue in business at a loss.* See Brooks-Scanlon Co. v. Railroad Commission, 251 U. S. 396, ante, 323, P.U.R. 1920C, 579, 40 Sup. Ct. Rep. 183. It was not decided that there might not be circumstances to which the act could not be applied consistently with the 5th Amendment, or that the act, in spite of its universal language, must be construed to reach literally every carrier by railroad subject to the Act to Regulate Commerce." (Italics ours.)

CONCLUSION

We can not urge too strongly the manifest hardship and injustice that would be worked upon the defendant if the punitive clause of the Wage Hours Act were to be imposed upon it. It stands unchallenged that the defendant has acted in good faith and has obeyed every provision of the contract which the Union itself had prepared on its own printed form and which the defendant had signed.

For several years after the Wage Hours Act became the law, the defendant was led to believe, by the plain-

tiffs, that this Act did not apply to the defendant. Accordingly, defendant made commitments for services to be rendered to its customers predicated upon the wages fixed in the agreement. The chief and outstanding item of cost in rendering window cleaning service is labor. To have the defendant required to pay alleged overtime with damages in an equal amount, would create a burden that can very well put the defendant out of business.

While we do not believe that the clear language of the Congress, exempting service establishments the major part of whose work is involved in intra-state commerce, should be interpreted by this Court in a manner inconsistent with the plain letter of the law, nevertheless, if this Court is to extend the provisions of the Wage Hours Act far beyond the clear purview of the law itself, then is it not fair to ask that when such a procedure is to be adopted, that it should become effective from the time of such judicial determination? Otherwise, employers acting in good faith and relying upon the clear and unequivocal statement of the law as passed, coupled with legal advice rendered by professional counsel representing both the union and the employer, proceed in their negotiations with unions, at their peril, never being able to tell in advance the limits of liability and the definition of their rights. We can not believe that this Court would intentionally create such an atmosphere of uncertainty on legislation involving labor-management relations so as to make it virtually impossible for an employer to undertake commitments, both with his customers and with labor and not know what his obligations and responsibilities are, even though the express language of the statute and professional legal advice combine to advise him as to his rights and responsibilities.

It is because of the grave problem that is created as hereinabove outlined, and because of the public policy that is involved, that we so urgently petition for a rehearing. It can be shown and demonstrated beyond any question, if opportunity is so permitted, that none of the plaintiffs ever expected anything more or beyond the rate of wages fixed in the printed agreement prepared and submitted by the union. Under the circumstances, to permit the plaintiffs to recover punitive damages is to reward double dealing and to punish an employer who acts honorably and decently.

Wherefore, defendant respectfully prays that the petition for rehearing be granted.

Respectfully submitted

DAVIDOW & DAVIDOW,
By LARRY S. DAVIDOW,
Attorneys for Defendant.

SUPREME COURT OF THE UNITED STATES.

No. 21.—October Term, 1945.

Thomas Martino, Petitioner, vs. Michigan Window Cleaning Co. | On Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

[February 4, 1946.]

Mr. Justice Burton delivered the opinion of the Court.

The questions here are the same as those in *Roland Electrical Co.* v. *Walling*, — U. S. —, No. 45, decided January 28, 1946. They are (1) whether respondent's employees, under the facts of this case, are engaged "in the production of goods for commerce" within the meaning of §§ 6 and 7 of the Fair Labor Standards Act of 1938 (52 Stat. 1060, 1062-1063, 29 U. S. C. §§ 206 and 207), and (2) whether if so engaged they nevertheless are exempted from the Act because they are engaged in a "retail or service establishment the greater part of whose selling or servicing is in intrastate commerce" within the meaning of § 13(a)(2), 29 U. S. C. § 213(a)(2). As in the *Roland Electrical Co.* case, we answer the first question in the affirmative and the second in the negative. The respondent also urges as a defense the written agreements which it had renewed from year to year with its employees for a higher number of hours of work per week, before paying overtime, than is prescribed in the Act.

The petitioner sued the respondent in the District Court of the United States for the Eastern District of Michigan. He sued for himself as a former employee of the respondent and also in a representative capacity for its other employees similarly situated. He sought to enjoin the respondent from violation of § 15(a)(1)(2)(3), 29 U. S. C. § 215(a)(1)(2)(3), of the Fair Labor Standards Act of 1938 and to recover under § 16(b) of the Act[1]

[1] "Sec. 16. . . .

"(b) Any employer who violates the provisions of section 6 or section 7 of this Act shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and

unpaid overtime compensation together with a like sum as liquidated damages, a reasonable attorney's fee and costs.

The District Court heard the case on the pleadings, stipulations of fact and the petitioner's motion for summary judgment, made several findings of law, ordered that the petitioners recover nothing and dismissed the complaint. 51 F. Supp. 505. The Circuit Court of Appeals affirmed the dismissal. 145 F. 2d 163. This Court has granted a writ of certiorari because of divergence of opinions among the Circuit Courts of Appeals as to the interpretation of § 13(a)(2), and now decides this case in favor of petitioners, upon principles stated in *Roland Electrical Co.* v. *Walling, supra.*

The respondent, a Michigan corporation with its principal place of business in Detroit, was engaged in washing windows, painting and similar maintenance work. The employees of the respondent were required in some instances to work longer than 42 hours per week subsequent to October 24, 1939, and longer than 40 hours per week subsequent to October 24, 1940, but were not paid time and a half except for hours worked in excess of 44 hours per week.[2]

The work of the respondent and of its employees was done within the State of Michigan and, for the most part, on the premises of the respondent's customers. It consisted primarily of cleaning the windows for those customers, always under contracts between them and the respondent. The greater part of this work

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in behalf of himself or themselves and other employees similarly situated, or such employee or employees may designate an agent or representative to maintain such action for and in behalf of all employees similarly situated. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action." 52 Stat. 1069, 29 U. S. C. § 216(b).

[2] "SEC. 7. (a) No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—

(1) for a workweek longer than forty-four hours during the first year from the effective date of this section,

(2) for a workweek longer than forty-two hours during the second year from such date, or

(3) for a workweek longer than forty hours after the expiration of the second year from such date,

unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed." 52 Stat. 1063, 29 U. S. C. § 207(a).

The Fair Labor Standards Act of 1938 was approved June 25, 1938, and this section became effective October 24, 1938. 29 U. S. C. § 207(d).

was done on windows on premises used by respondent's customers in the production of goods for interstate commerce.[3] Under the circumstances of this case the cleaning of the windows of industrial plants by the employees of the respondent is an occupation necessary to the production of the goods produced in those plants.[4] If the services rendered in this case had been rendered by employees of respondent's customers engaged in the production of goods for interstate commerce, those employees would have come under the Act. Respondent's employees are not to be excluded from such coverage merely because their employment to do the same work was under independent contracts. *Kirschbaum Co.* v. *Walling*, 316 U. S. 517, 524; *Warren-Bradshaw Co.* v. *Hall*, 317 U. S. 88, 90.

The respondent was engaged almost exclusively in servicing customers for whom such services were necessary in their production of goods for interstate commerce. This took place in the midst of producing "the flow of goods in commerce" intended to be covered by the Act. Accordingly, the respondent cannot be classified as a "retail or service establishment" within the meaning of § 13(a)(2) which contemplates an establishment serving ultimate consumers beyond the end of such "flow of goods in commerce." *Roland Electrical Co.* v. *Walling*, *supra*.

Throughout this case, the respondent has urged as a defense that, in good faith and from year to year, since before 1939, it has entered into and renewed written agreements with the labor union of which petitioner and those for whom this suit is brought were members. Some of these agreements, renewed since the Act became effective, applied to the periods here in question and required the respondent to pay overtime for work done in excess of 44 hours a week. This requirement was fully observed. The Dis-

[3] Many of the customers were engaged also in interstate commerce on those premises.

[4] "... an employee shall be deemed to have been engaged in the production of goods if such employee was employed ... in any process or occupation necessary to the production thereof, in any State." (29 U. S. C. § 203(j).

See 100 Factory Management and Maintenance, March 1942, p. 101; 74 Architectural Forum, May 1941, pp. 333, 335; 41 National Safety News, March, 1940, p. 88; Balderston, Karabasz and Brecht, *Management of an Enterprise* (1935) p. 145; Canover, *Clean Windows for Safety*, 74 Safety Engineering, Sept. 1937, pp. 13-14; 63 The Foundry, Aug. 1935, p. 89; Pandall and Martin, *Making your Windows Deliver More Daylight*, 22 Transactions of the Illuminating Engineering Society, March 1927, pp. 239-257.

trict Court made a finding that the existence and observance of such agreements constituted no bar to the right of the employees to recover under § 16(b) if the Fair Labor Standards Act applied to the case and required overtime pay for work done in excess of a lesser number of hours per week than were stipulated in the agreements. It was not necessary for the Circuit Court of Appeals to consider the effect of this agreement because, in its view, the Act did not apply to the respondent's employees. However, under the view which we take, the respondent is entitled to a decision on this further defense. We agree with the District Court that the agreements cannot supersede the Act and are not a bar to this action. Cf. *Brooklyn Bank* v. *O'Neil*, 324 U. S. 697, 707, *et seq.*

For these reasons, the judgment of the Circuit Court of Appeals is reversed and this case is remanded to the District Court for further proceedings in accordance with this opinion.

Reversed.

Mr. Justice JACKSON took no part in the consideration or decision of this case.